Feb 8 1870
Mr Hale

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 370.

THE UNITED STATES, APPELLANTS,

vs.

HENRY GROSSMAYER.

APPEAL FROM THE COURT OF CLAIMS.

Dismissed

FILED DECEMBER 13, 1869.

Filed Jan 22 1870

SUPREME COURT OF THE UNITED STATES.

No. 370.

THE UNITED STATES, APPELLANTS,

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HENRY GROSSMAYER.

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1 In the Court of Claims.

HENRY GROSSMAYER
vs.
THE UNITED STATES. } No. 2798.

Petition.

To the honorable the Court of Claims of the United States of America:

Your petitioner, Henry Grossmayer, respectfully shows that he is a citizen of the United States, and resides in Washington City, District of Columbia, and that he has at all times borne true allegiance to the government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government.

Your petitioner further states that on or about the first day of October, in the year eighteen hundred and sixty-four, at Savannah, in the State of Georgia, your petitioner was the owner of forty-eight bales of cotton, then and there being; and on the day and year last aforesaid, at said city of Savannah, in said State of Georgia, all of the said forty-eight bales of cotton were seized and taken possession of by Simeon Draper, who then and there was an agent for the Treasury Department of the United States, and who seized the said forty-eight bales of cotton for and on behalf of the government of the United States, and immediately thereafter caused the same to be taken to the

2 city of New York, in the State of New York, at which city the said 48 bales of cotton were at divers times sold for and on behalf of the government of the United States, and the net proceeds of the sales thereof were paid into the treasury of the United States.

Your petitioner does not know the average number of pounds for each bale of said cotton, and from the best of his information and belief he states that said cotton averaged 500 pounds to each bale, making 24,000 pounds.

And your petitioner further avers that the said cotton, at the time and place where the same was seized by the said Draper as aforesaid, was worth eighty cents per pound; amounting in all to the sum of $19,200.

Your petitioner further shows that on or about the 15th day of January, in the year 1865, at Savannah, in the State of Georgia, he demanded the said 48 bales of cotton of the said Simeon Draper, who still was treasury agent as aforesaid, and who then had and held the said cotton, and your petitioner was then and there ready and willing to prove that he was loyal to the government of the United States, and had at all times borne true allegiance to the same, and had not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, and was in truth and in fact the owner of the said 48 bales of cotton. Yet the said Simeon Draper, treasury agent as aforesaid, refused to return to your petitioner the said 48 bales of cotton, or any part thereof.

Your petitioner further shows that his said cotton has never been abandoned, or forfeited, or become liable to seizure under any of the acts of Congress in that behalf made and provided; and that the said cotton was not liable to seizure or capture under the laws of nations, or under the laws and usages of war, or any act of Congress; and that no proceeding for the purpose of condemning said cotton has ever been insti-

tuted in any court or before any tribunal; and that the said cotton has never been condemned.

And your petitioner further shows that at the time and place when and where the said cotton was seized as aforesaid, the United
3 States, for and in consideration thereof, agreed to pay to your petitioner so much as the said cotton was then and there reasonably worth; and that the said cotton was then and there reasonably worth the sum of $19,200.

And your petitioner further shows that he is informed and believes that the government of the United States, by its agents in that behalf, assert and maintain that the said 48 bales of cotton were captured property. And further complaining, he respectfully shows that, under the provisions of the act of Congress approved March 2, A. D. 1863, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," he is entitled to receive the net proceeds of the said 48 bales of cotton, which, from the best of his information and belief, were $14,400.

Your petitioner therefore prays that you will render a judgment in his favor for the said sum of $19,200, the reasonable value of the said 48 bales of cotton at the time it was seized as aforesaid, at Savannah aforesaid.

But if, in the opinion of the court, such judgment should not be rendered, your petitioner then further prays that you will enter judgment in his favor for the said sum of $14,400, the net proceeds of the sales of the said cotton, at the time it was sold at the city of New York aforesaid.

Your petitioner further shows that he made application to the Secretary of the Treasury for return to him of the net proceeds of the sales of the said cotton, which application was, on the 9th day of January, 1867, at the Treasury Department, by letter refused.

Your petitioner further prays for such other and further relief in the premises as may be equitable and just. And, as in duty bound, he will ever pray.

HENRY GROSSMAYER.

JOHN JOLLIFFE,
GEO. S. THOMPSON,
Solicitors.

4 DISTRICT OF COLUMBIA, *Washington County, ss:*

Before me, the undersigned, a notary public in and for the said county, personally appeared Henry Grossmayer, who, being duly sworn, states that he is the claimant named in the foregoing petition; and that no assignment or transfer of the claim mentioned in said petition, or any part thereof, or any interest therein, has been made; that the said claimant is fully entitled to the amount therein claimed, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

HENRY GROSSMAYER.

Sworn and subscribed to before me this 17th day of May, 1867.
THOS. J. MYERS, *Notary Public.*

John Jolliffe, George S. Thompson, *Solicitors.*

The foregoing petition was filed 22d June, A. D. 1867.

5 In the United States Court of Claims.—December term, 1868.

HENRY GROSSMAYER
vs.
THE UNITED STATES. } No. 2798.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of fourteen thousand four hundred dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

And for a further plea to the said petition, the said defendants say, that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim, to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents, therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," approved March 12, 1863.

Whereby, and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the government, and for the better defence of the treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney General.

6 In the Court of Claims.

HENRY GROSSMAYER
vs.
THE UNITED STATES. } No. 2798.

And now, to wit, 15th of February, A. D. 1869, the court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Henry Grossmayer, claimant aforesaid, have and recover of and from the United States the sum of eight thousand and forty dollars and ninety-six cents, ($8,040\frac{96}{100}$.)

By the court.

7 In the Court of Claims.—Dec. term, 1868.

HENRY GROSSMAYER
vs.
THE UNITED STATES. } No. 2798.

To the Court of Claims:

The defendants hereby make application for the allowance of an appeal to the Supreme Court of the United States from the judgment rendered in this action on the 15th day of February, 1869, in favor of the claimant for the sum eight thousand and forty dollars and ninety-six cents, ($8,040\frac{96}{100}$.)

Dated April 28, 1869.

T. LYLE DICKEY,
Ass't Att'y Gen'l.
ROBT. S. HALE,
Special Counsel of Treasury Dep't.

Filed in the clerk's office April 28, A. D. 1869.

8 At a Court of Claims held at the Capitol in the city of Washington, 17th May, A. D. 1869:

HENRY GROSSMAYER
vs.
THE UNITED STATES. } No. 2798.

Ordered that the application for an appeal in this case be allowed.

By the court.

9 In the Court of Claims.

HENRY GROSSMAYER
vs.
THE UNITED STATES.

The finding of facts and the conclusions of law on which the court founded its judgment.

1st. The claimant, Henry Grossmayer, before and during the rebellion, resided in the city of New York and in the District of Columbia, and never gave any aid or comfort to the rebellion, or to the persons engaged therein, but consistently adhered to the United States.

2nd. Elias Einstein, prior to and during the rebellion resided at Macon, in the State of Georgia, engaged in trade there as a merchant, and his loyalty was not proved.

3rd. Before the rebellion Grossmayer had sold goods on credit and loaned money to Elias Einstein. At the breaking out of the rebellion he owed Grossmayer on these accounts about four thousand
10 dollars, ($4,000 00,) for which the latter held his notes.

4th. By a witness who passed back and forth several times during the war between Macon and New York, Grossmayer requested Einstein to remit him the amount in money or sterling exchange, or invest for him in cotton the amount he owed him, and hold it for him until after the close of the war. In pursuance of this direction, Einstein, in January and April, 1863, purchased forty-eight bales of upland cotton for Grossmayer, and informed the latter of it, and he expressed himself satisfied with what was done. He then shipped it to Savannah from Macon, to Abraham Einstein, for Grossmayer, and Einstein caused it to be stored in his own name, to prevent its seizure and confiscation by the rebel authorities. It remained so stored until the capture of Savannah by the Union army under General Sherman in December, 1864, when it was reported and returned to the United States military au-
11 thorities as the cotton of Grossmayer; was taken by them and shipped to New York, and sold for account of the United States by their agent, and the net proceeds, amounting to $8,040 96, were paid into the treasury of the United States. This suit is brought to recover these net proceeds, and the claim was preferred in this court on he 22nd of June, 1867.

5th. The cotton, the proceeds of which are in suit, was purchased by Einstein from persons resident at the time in the State of Georgia, and whose loyalty has not been proved.

6th. We find that the cotton was purchased by Einstein for Grossmayer and as his agent.

7th. After the seizure and the sale of the cotton, and in the fall of 1866, Grossmayer caused the amount of the notes he held against Einstein to be demanded of the latter.

Einstein claimed to be credited with the amount paid out for
12 the forty-eight bales of cotton, the proceeds of which are in question in this case, and to which Grossmayer assented, and such amount was so deducted and the balance paid to Grossmayer by Einstein.

This seventh finding of fact is stated and certified at the instance of the Attorney General; but we do not regard it as an ultimate fact in the cause—but one item, among many, of evidence bearing on the character of the transaction and its bona fides—

1st. And that, taken in connection with the other evidence in the cause, it did not disprove the agency of Einstein, or prove fraud between him and Grossmayer, and as matter of law did not bar the claimant's recovery.

And the court further held as matter of law—

2nd. That the suit was brought within two years after the suppression of the rebellion, and that the claim was not barred by the lim-
13 itation in the 3rd sect. of the act of Congress of March 12th, 1863.

3rd. That the sale to Grossmayer was not void by reason of the cotton having previously belonged to persons who had given aid and comfort to the rebellion, as it never had been seized or condemned as the property of such disloyal persons.

4th. That the purchase of the cotton by Einstein for Grossmayer,

under the facts found, was not a violation of the war-intercourse acts, and did vest the property in Grossmayer.

5th. That, upon all the facts, the claimant was entitled to judgment for the sum of $8,040 96.

14 In the Court of Claims.

HENRY GROSSMAYER
vs.
THE UNITED STATES. } No. 2798.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney General of the United States, and of the for the allowance of an appeal, as filed in the clerk's office 28th April, A. D. 1869, and of the order of the Court of Claims, allowing the same, of the finding of facts, and the conclusions of law on said facts, upon which the majority of the court founded their opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of December.

[SEAL.] JOHN RANDOLPH.
Ass't Clerk Court of Claims.

(Indorsement on record:) Court of Claims. No. 370. The United States, appellants, vs. Henry Grossmayer.

Filed 13th December, 1869.

under the facts found, was not a violation of the war-intercourse acts, and did vest the property in Grossmayer.

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[SEAL.]

JOHN RANDOLPH.
Ass't Clerk Court of Claims.

(Indorsement on record:) Court of Claims. No. 370. The United States, appellants, vs. Henry Grossmayer.

Filed 13th December, 1869.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, *Appellants*,
vs.
HENRY GROSSMEYER. } No. 370.

On appeal from the Court of Claims.
Brief for appellants.

ROB: S. HALE,
Special Counsel for the United States.

STATEMENT OF THE CASE.

At the breaking out of the rebellion, Elias Einstein, a resident of Macon, Georgia, was indebted to the claimant, a resident of the city of New York, in the sum of about $4,000. He continued to reside in Georgia during the rebellion, and his loyalty is not proven.

During the war, through a messenger passing to and fro through the lines, the claimant instructed Einstein to remit the amount of his debt in sterling exchange, or to invest for him in cotton the amount due from Einstein, and hold it for claimant to the close of the war.

Pursuant to these instructions, Einstein purchased for the claimant, in the months of January and April, 1863, 48 bales of cotton, and informed the claimant by letter that he had so done, and the claimant signified his approval of the transaction.

Einstein shipped the cotton from Macon to Savannah, to one Epstein, for the claimant, and Epstein caused it to be stored in Savannah, in his own name, to prevent its seizure by the rebel authorities.

It remained so stored till the capture of Savannah, in December, 1864, when it was reported to the United States military authorities as the property of the claimant, was turned over to an agent of the Treasury Department, shipped to New York, sold for account of the United States, and the net proceeds (found by the court to be $8,040 96) paid into the Treasury.

The cotton in question was purchased by Einstein (in 1863) from persons at the time residing in the State of Georgia, where the rebel organization then held sway, and the loyalty of such vendors is not proven.

The court find that the cotton in question was purchased by Einstein as the agent of the claimant and for him. The facts constituting the agency are specially found as above.

Up to the fall of 1866, the claimant still held the notes against Einstein, evidencing his indebtedness, and claimed the indebtedness of Einstein to him to be still existing. The cotton in question was then first credited by the claimant to Einstein.

This suit is brought under the third section of the act of March 12, 1863, and the claim was preferred in the Court of Claims on the 22d June, 1867. The defendants, among other defences, interposed the plea that the claimant did not prefer his claim "within two years after the suppression of the rebellion."

The court below rendered judgment for the claimant for $8,040 96, found by the court to be the net proceeds of the cotton in question, and from this judgment the defendants appealed to this court.

POINTS.

I.

The court below erred in assuming to determine the amount of the net proceeds of the cotton in question, and to render judgment for a specific sum.

No such jurisdiction is given to that court by the act in question.

That act provides that the court shall pass upon certain facts, and the only judgment to be rendered therein for the claimant is, that he is entitled "to receive the residue of such proceeds after the deduction," &c., leaving the amount to be determined by computation by the proper officer of the Treasury Department.

(See dissenting opinion of Judge Nott in the court below, filed with this brief.)

II.

The action was not brought within "two years after the suppression of the rebellion," and the court below had no jurisdiction under the act. (12 Statutes at Large, p. 820, section 3.)

The claimant "preferred his claim" by the filing of his petition 22d June, 1867. The question is, when did the "two years after the suppression of the rebellion" begin to run? This is a question of the *actual* suppression of the rebellion and termination of the war, or of actual hostilities, and is entirely distinct from the political question of the powers of the United States in the government of the States lately in rebellion, or in the control and regulation of their renewal of political relations to the Union.

These political questions do not of necessity turn on the point of continuance or non-continuance of *actual* war or rebellion, but on that of the question of the continuance of

the rights of war after the actual termination of actual hostilities.

On this question we submit—

1. The existence of the rebellion, its commencement and suppression; and the respective dates of these, are historical facts, "which the court is bound to notice and to know." They are facts whose existence does not depend on any declaration or other legislative or executive act.

The true test of the existence of civil war is summarily stated by this court in the *Prize Cases*, (2 Black, 667:) "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, *civil war exists*," &c.

The test of its termination is logically the same. When the armed organization against the government has ceased to exist, when the courts of justice are no longer prevented by violence, there is no longer civil war, and the rebellion is suppressed. (Hanger *vs.* Abbott, 6 Wall., 532, 541.)

In April, 1865, the armies of the rebel generals Lee and Johnston surrendered, followed by the surrender of Taylor's army, on the 4th May, and by that of Kirby Smith, on the 26th May, 1865. (Moore's Rebellion Record, vol.—. p.— With the last-named surrender, armed resistance to the authority of the United States ceased, the civil war was ended, and the rebellion suppressed, as *matter of fact*. From that date, claimants were entitled to sue in the Court of Claims, under the act of 12th March, 1863, and at the expiration of two years from that date (26th May, 1867,) their right to sue terminated.

If this is not so, if the rebellion was not suppressed within the meaning of this act until the 20th August, 1866, as held by the Court of Claims, and the condition of war still continued, it follows that until the last-named date the rebel States were still a hostile and belligerent power to the

United States; its inhabitants in law enemies of the inhabitants of the United States; "all intercourse, commercial or otherwise, between them unlawful; all contracts existing at the commencement of the war suspended, and all made during its existence (and down to August, 1866,) utterly void." Bills of exchange could not be drawn by inhabitants of one section on those of the other; money or bills could not be lawfully remitted; the inhabitants of one section could have no standing in the courts of the other; and all the disabilities, as to intercourse or communication, that are recognized as existing in the case of active belligerents, continued to exist between the North and the South, for fifteen months after, in the universal speech of the people, "the war was over."

That no such state of things did exist from the 26th May, 1865, to the 20th August, 1866, is a historical fact, judicially known to the court. Full and free intercourse, commercial and otherwise, between the inhabitants of the different sections was at once resumed, trade opened on its ordinary basis, remittances were made, debts paid, and bills of exchange drawn between the inhabitants of the lately warring sections.

The courts which, in each section, had been by the laws of war closed to the inhabitants of the belligerent section were immediately opened to all. The Court of Claims immediately assumed jurisdiction of claims under the act in question, and which, by the terms of the statute, could only be commenced "after the suppression of the rebellion;" and between the actual termination of hostilities and the date fixed by the court below as the legal "suppression of the rebellion," (20th August, 1866,) more than thirty causes were commenced in that court under the act, and the court entertained jurisdiction of them.

In this court, the causes pending at the beginning of the

war to which inhabitants of the States in rebellion were parties, and which had been suspended and postponed from term to term during the continuance of the war, were, at the December term, 1865, by the order of the court, called and heard in their order on the calendar, or on special days to which they were assigned.

The executive and administrative departments of the government recognized the restoration of peaceful relations by the reopening of postoffices, (Postmaster General's report, 1868, p. 263,) the letting of contracts for mail service throughout the rebellious States, (Postmaster General's Report, 1865, pp. 9, 10,) and the extending of the revenue system throughout the same States, (Report of the Secretary of the Treasury, 1865, pp. 29, 30.)

The United States courts were reopened in the insurrectionary districts.

The insurgent cruisers which continued their depredations upon our commerce after the suppression of the insurrection within our own limits, were no longer recognized as belligerents, nor even as engaged merely in insurrection or rebellion; but became, in contemplation of international law, and by the deliberate judgment of our own government as well as foreign governments, simply pirates.

The various proclamations of the President issued in May, June, and July, 1865, (12th Statutes at Large, pp. 757 to 772,) do not create the condition of peace, but are simply executive recognitions of the fact that peace was restored, precisely as the action of the courts constituted judicial recognitions of the same fact.

2. But if it shall be held that official executive or legislative action is requisite to establish the fact of the termination of the rebellion, then it is submitted that the proclamation of the President of June 17, 1865, (13 Statutes at Large, p. 764,) is a complete recognition and declaration of

the suppression of the rebellion within the State of Georgia; and that the cause of action having arisen in that State, the statute begins to run whenever the rebellion is there suppressed. (See dissenting opinion of Judge Nott, filed herehereherewith.)

The proclamation of 13th June, 1865, (13 Stat. at Large, p. 763,) removed all restrictions on "internal, domestic, and coastwise intercourse and trade," with all the insurrectionary States east of the Mississippi, and thus recognised the termination of the war as to those States. Freedom of mutual intercourse and trade is in itself inconsistent with a condition of war, and the restoration of such freedom is the recognition of peace. And see on this head the opinion of Judge Shipman, in the circuit court for the district of Connecticut, in Semmes *vs.* City Fire, Ins. Co., American Law Reg., vol. 8, N. S., 673, (Nov., 1869.)

3. The statute of March 2, 1867, (14 Stat. at Large, 422, § 2,) which is relied on as a legislative deternaion of the time of the close of the rebellion, has no such application.

Statutes are always to be construed with regard to their subject-matter, and are not to be extended by construction to embrace matters evidently not within the purview of the legislature.

The object of the statute is not to determine the end of the rebellion, either for judicial or legislative purposes, but to fix a definite time when the additional pay given to soldiers by the act of 20th June, 1864, (13 Statutes at Large, p. 144, section 1,) should terminate.

And it does not, in terms, fix the end of the rebellion; but fixes the desired day by recital from "the close of the rebellion, as announced by the President," &c.

To give to it the effect of fixing the close of the rebellion for the purposes of the abandoned and captured property act, or for any other judicial or legislative purpose, would

be to give it an effect palpably never contemplated by the Congress.

III.

The cotton in question was purchased by Einstein in the spring of 1863, of persons then residing in the State of Georgia, "where the rebel force or organization held sway," and whose loyalty is not proven.

Such residence, (which is, in the absence of evidence to the contrary, to be presumed voluntary,) is, by the act of 25th June, 1868, (15 Statutes at Large, p. 75, §3,) made *prima facie* evidence "that such person did give aid and comfort to said rebellion and to the persons engaged therein."

By the act of 17th July, 1862, (12 Statutes at Large, p. 591, § 6,) and the proclamation of the President issued in pursuance of it 25th July, 1862, (*Id.*, p. 1266,) "all sales, transfers, or conveyances" of the "estate and property" of such persons, after the 23d September, 1862, were made "null and void."

Einstein's vendors could, therefore, convey no title to him or to his principal, and the claimant's title fails.

It is objected that the act of 1862 does not affect the claimant's title, for the reason that no proceedings were had under that act for the seizure and condemnation of the property in question; and that it is only by such seizure and condemnation under that act that the forfeiture declared by the act can be enforced, or the prohibition of sale and transfer made effective.

This objection is urged on constitutional grounds, that to give a different effect to the act would be a deprivation of property without "due process of law;" also, on the ground that the construction of the statute itself imports such forfeiture and inability to convey only in the case of proceedings instituted under the act. It is also objected that the

act of 1862 is repealed by the abandoned and captured property act of 12th March, 1863. None of these objections are believed to be sound. As to the constitutional objection, if the question related solely to the forfeiture of the property, it is submitted that, by capture in war, the rights of the United States attach, so that the vendor of the property could not claim the benefit of the provision for "due process of law." But it is not necessary for us to discuss the question of the effect of the forfeiture clause in the act of 1862. The only clause which concerns the case is the one prohibiting sales and transfers; and of the power of Congress to enact this provision pending the war, there can be no doubt. The inhabitants of the rebel States, though belligerent and enemies, were still subject to the laws of the United States. That Congress could by law, as a war measure, invalidate sales by one rebel to another, would seem to admit of no more doubt than that it could prohibit or permit, in its own discretion, transactions between inhabitants of loyal States and those of States in rebellion. Nor is there anything in the construction of the act itself limiting the effect of the prohibition of sales to property which should be seized and condemned under the act. The "such property" of which sales are prohibited is "all the estate and property, moneys, stocks, and credits of such person," and which are declared by the act to be "liable to seizure," and not property which shall have been seized and condemned. Nor is the act of 1862 repealed by the abandoned and captured property act. These acts are to a limited extent *in pari materia*, and are so far to be construed by the aid of each other. But in their principal scope they relate to different subjects, provide for different ends, and certainly contain no provisions inconsistent with each other, so that both cannot stand. The proof of ownership required

under the latter act is of necessity lawful ownership as well under the act of 1862 as under all other subsisting laws.

But this is no longer an open question in this court. In the case of McKee *vs.* The United States. decided at the December term, 1868, this court distinctly held the of act 1862 to be valid and operative; and that case was not a case of seizure and proceedings under the act of 1862, but was a case of capture precisely as in the principal case. The only difference between the case is, that after the capture, ins the case of McKee, the property was libelled as prize of war, while in the principal case, after the capture, the claimant brings his suit in the Court of Claims under the act of 1863; a difference which certainly cannot affect the respective rights of the parties as to their title to the property. In that case the court held, that the claimant deriving his alleged title by purchase after the 23d September, 1862, from a person within the inhibition of the act of 1862 as to sales and transfers of property, his title must fail. The language of the court is, "this statute prohibited a person occupying the position A. W. McKee did from selling his property; and it follows, as he had no capacity to dispose of it, that the claimant could acquire no title to it."

IV.

The alleged transactions between the claimant, in New York, and Einstein and the vendors of the cotton to Einstein, in Georgia, were in violation of the laws of war and of the non-intercourse act of 13th July, 1861, (12 St. at L., 257,) and the proclamations under the same, and the claimant could acquire no title through those transactions. (Mr. Justice Nelson, in the prize cases, 2d Black, 687; Hanger *vs.* Abbot, 6th Wallace, 532, 535; the Ouachita cotton, *id.*, 521; the United States *vs.* George W. Lane, decided at the present term.)

It will be borne in mind that this case proceeds upon the

assumption that Einstein purchased the property in question in Georgia, a rebel State, during the war, for the claimant and as his agent; and that that agency was constituted during the war by direct communication through a messenger between the claimant in New York, his residence, and Einstein in Georgia, his residence.

This transaction involves two direct violations of the laws of war:

(1.) The creating of the agency of Einstein, of itself depending on intercouse which is prohibited; and

(2.) The purchase by claimant, through his agent, from belligerents of the property in question.

The cases of Ward *vs.* Smith, (7 Wallace, 447,) Conn *vs.* Penn, (1 Peters C. C., 496,) Buchanan *vs.* Curry, (19 J. R., 13,) and the other cases cited by respondent's counsel, go no further than to recognize the doctrine that an alien enemy may have an agent in the belligerent country in time of war, to whom payment of a debt or delivery of property under a contract may be lawfully made. But in all those cases the agency was created before the war, and the acts of the agent extended no further than the receipt of payment of a debt, or delivery of property.

The general doctrines as to the effect of a state of war upon intercourse between residents of the belligerent States are summarily stated in the case above cited on behalf of the appellants, and fully discussed by Chancellor Kent and the learned Abraham Van Vechten, in the case of Griswold *vs.* Waddington, (16 J. R., 438;) and within the principles established by those cases, and the cases cited in them, it is plain that the intercourse requisite to constitute the agent was of itself illegal, and in an equal, if not higher degree, the purchasing of the cotton through the agent from other belligerents. "A belligerent could not do by a partner or agent what he could not do by himself." * * * *

"Nor can he be concerned in any such trade, indirectly or circuitously, through the intervention of a neutral port, or through the agency of third persons." (Griswold *vs.* Waddington, 16 J. R , 495, 496; The Franklin, 6 C. Rob., 127; The Jonge Pieter, 4 C. Rob., 79, 86.)

V.

The facts found by the court below do not sustain its conclusion that Einstein bought the cotton "for Grossmeyer, and as his agent," or that the title to the same was vested in the claimant at the time of its capture.

The relation between the claimant and Einstein was that of creditor and debtor, not of principal and agent.

Nothing in the case imports a change of that relation.

The instructions given by the claimant to Einstein import nothing more than this: "In case you cannot remit to me the amount of your indebtedness, invest the money in the most secure property you can find, and hold it as a means of payment of your debt to me at the close of the war."

All the subsequent acts of the parties in relation to the cotton are consistent with this view, and inconsistent with that of the claimant. And the fact that the parties themselves made no pretence of any change in this original relation for nearly two years after the capture of the cotton is wholly inconsistent with the claimant's present claim.

Nothing appears as to the amount of the investment by Einstein in the cotton, that such investment was of the moneys of the claimant, or that the cotton was purchased as the property of the claimant.

V I.

The transaction in the fall of 1866 between the claimant and Einstein could have no effect to vest the title to the

cotton in the claimant, or give him a claim against the United States.

The act of 12th March, 1863, only gives the right of action to the "owner" of the captured property. *Ownership* could only exist in a claimant before capture, as capture vested the title in the United States. And the act makes no provision for an assignment of the claim, or for suit by an assignee.

Besides, Einstein being (presumably from his residence in the rebel jurisdiction) a rebel, had under the act no claim which was the subject of assignment.

ROB: S. HALE,
Special Counsel for U. S.

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UNITED STATES COURT OF CLAIMS.

No. 2798.

DECEMBER TERM, 1868.

HENRY GROSSMAYER vs. THE UNITED STATES.

Where a person residing in a loyal State directed his debtor, living in an insurrectionary State, to invest the amount due him in cotton and keep it for him till the rebellion should be suppressed, and the debtor made the purchase in good faith, and turned it over to another to be held for the use of the creditor, and the creditor ratified the purchase, and the same cotton was captured by the national forces and was sold and the net proceeds paid into the treasury, it was held that such owner, on proof of loyalty, as required by the acts of Congress, was entitled to recover such net proceeds under the 3d section act of March 12, 1863.

A vendor of cotton which, after the sale and transfer, was seized and sold by the United States, is not incompetent as a witness for the claimant in a suit for the net proceeds by reason of the 4th section of the act of June 25, 1868.

To render a witness incompetent under that section, he must be a party on the record, or must have an interest in the event of the action, or the claim in suit must have been derived from or through him.

The fact of when the rebellion was suppressed, is for the determination of the political branches of the government, and the judiciary are concluded by their action in the premises.

The President, by virtue of the acts of Congress of July 13, 1861, July 31, 1861, and June 2, 1862, had the right to declare from time to time what States or parts of States were in insurrection against the United States.

This power necessarily carried with it the right to decide and declare that the rebellion had been suppressed in any State or part of a State where it had before existed.

The President's proclamation of August 20, 1866, was an authoritative declaration that the rebellion was then suppressed, and it is to be so regarded on and after that day.

Peck and Nott, JJ., dissenting.

The recognition and adoption of the time so designated by the President, in the act of Congress approved March 2, 1867, § 2, gives to it the force and sanction of positive law, and makes it binding and conclusvie on the courts.

Peck and Nott, JJ., dissenting.

All claims for the proceeds of abandoned or captured property must be preferred to the Court of Claims within two years after August 20, 1866, or they will be barred by the limitation contained in the act of March 12, 1863, § 3.

Peck and Nott, JJ., dissenting.

The opinion of the court, by CASEY, CH. J.:

The claimant in this case is a citizen of the United States, and resides in the city of Washington, in the District of Columbia. He claims to have at all times borne true allegiance to the government of the United States, and avers that he has never aided, abetted or given encouragement to rebellion against the same. He further avers that on or about the first day of October, A. D. 1864, he was the owner of forty-eight bales of cotton stored in the city of Savannah, in the State of Georgia, and that, upon the surrender of that city to the forces of the United States, this cotton belonging to him was seized by the military, turned over to the United States cotton agent, and by him shipped to New York, and was sold and the net proceeds were paid into the Treasury of the United States. He prays a judgment under the 3d section of the act of March 12, 1863, for such net proceeds.

A number of preliminary questions are raised in regard to the admissibility of testimony, and these will be disposed of first.

In the testimony of Abraham Epstein, (record, page 2.) These several items of testimony refer to and speak of the contents of a letter which is neither produced nor duly accounted for, and they are therefore to be rejected.

The matter objected to on page 3 is brought out on cross-examination, and we refuse to strike it out.

The evidence in relation to the letter in the re-direct examination of same witness, on page 4, is rejected as incompetent.

Three items of testimony in the deposition of Elias Einstein, on page 6, printed record, are objected to because they refer to the contents of letters not produced or accounted for; the objection is sustained, and this testimony is ruled out.

Also an item on page 3, in Einstein's testimony. We think this competent evidence, as it does not appear to have been by letter, and we therefore overrule the objection.

The conversation between the witness Waxelbaum and Einstein, on page 32, record, is objected to. We think it competent. It was afterwards substantially communicated to Grossmayer by the witness, and is a legitimate part of the history of the transaction.

The defendants also, by their special counsel, move to strike out the entire deposition of Elias Einstein, who, it is alleged, is the vendor of the cotton; or, if not, is interested in the event of the suit, and therefore in either aspect incompetent, by reason of the act of June 25, 1868, § 4; that section provides, "That no plaintiff or claimant, or any person from or through whom any such plaintiff or claimant derives his alleged title, claim or right against the United States, or any person interested in any such title, claim or right, shall be a competent witness in the Court of Claims in supporting any such title, claim or right, and no testimony given by such plaintiff, claimant or person shall be used."

The counsel for the government contends that the person who sold the cotton to the claimant comes within the rule of exclusion mentioned in the act, as the person through whom the claimant derives

title, claim or right against the United States. We do not think this view of the law can be sustained. Admitting Einstein to be the vendor of the cotton, he does not come within the letter, the spirit or intention of the act. Three classes are excluded—

1st. The claimant or plaintiff of record.

2d. Any person through whom such claimant or plaintiff derives the claim or right he is seeking to enforce against the United States, in the suit in hand.

3d. Or any person who has an interest in the event of the suit.

Now it must be apparent that a vendor of personal property, against whose title there is no allegation or suspicion, and who transferred it to another in good faith, can have no interest in a suit brought by his vendee to recover that property or its proceeds, against one who after the sale was complete converted it to his own use without lawful authority. This proposition as applied to the situation of the witness, Einstein, I think, will not be denied. If I am too confident in that expression, I still believe it cannot be refuted.

But we think that the error arises from not distinguishing between the person from whom a claimant derives his title to the property, which afterwards becomes the foundation for the claim, and the claim itself; the vendor of the former is not excluded, the assignor of the latter is. If the United States seize the house or ship of one man, and he transfers it *then* to another, this latter brings suit for the property, or its price, his vendor is excluded, because he is then the person through whom the claimant derives *his claim or title, or right against the United States.* But between that case and ours the distinction is as broad as the highway. He is not the claimant. The claim has not been derived through him. The transfer of the property was perfect and complete, if Grossmayer has any claim at all, long before its seizure. Grossmayer's claim against the United States is derived from that seizure alone, and not from Einstein's transfer of the cotton. Has he any interest? is the only remaining inquiry. Grossmayer's claim rests upon the fact that his title was complete before the seizure The proof is, that he and Einstein have settled for the cotton, and that Einstein has been paid for it. Such would, we think, be the effect of Grossmayer's claim here. After claiming the proceeds of this cotton he would, in a suit between Einstein and himself for the price of it, be estopped from denying his purchase, and his liability for its value. And whatever the event of this suit, it could not affect his rights as against Grossmayer. This leaves him free from valid objection as a witness, and we refuse to suppress his deposition.

On the merits of this case we find the following facts. Prior to the rebellion, the claimant, Grossmayer, was a resident of the city of New York. Elias Einstein, a friend of his, resided and was engaged in business in Macon, in the State of Georgia. Grossmayer had on several occasions advanced money to Einstein for the purchase of cotton on joint venture, and also advanced various sums to him as loans. At the breaking out of the rebellion there were several thousand dollars due from Einstein to Grossmayer. By a witness,

Waxelbaum, who passed back and forth several times between Macon and New York, the parties communicated with each other. Grossmayer directed Einstein to purchase cotton for him with the money in his hands, or that he owed him, and hold it for him until after the war. Einstein made a purchase of forty-eight bales, sent notice back by Waxelbaum that he had done so, and after some time shipped it to Epstein, to Savannah, and directed him to have it stored for Grossmayer. He placed it in a warehouse in Savannah, but not in the name of Grossmayer, as he swears it would have been seized and confiscated by the rebel authorities had he done so. This cotton remained in Savannah until its capture by Sherman's army in December, 1864. It was then, with the other cotton found in that city, shipped to New York, to Simeon Draper, the cotton agent, and was sold, and the net proceeds were paid into the Treasury of the United States. These net proceeds amount to the sum of eight thousand and forty dollars and ninety-six cents. This suit is brought to recover these proceeds, and his petition was filed on the 22d June, 1867.

The claimant has proved that he never resided at any time "where the rebel force or organization held sway;" that he never gave any aid or comfort to the rebellion, and that he did, during said rebellion, consistently adhere to the United States.

The special counsel for the United States interposes several objections to the claimant's recovery.

1st. That he has not proved his ownership, as required by the 3rd section of the act of March 12, 1863.

2nd That he has not proved his loyalty, as required by the 3rd section of the act June 25, 1868, and March 12, 1863.

3rd. That the claim not having been preferred in the Court of Claims within two years after the suppression of the rebellion, it is barred by the limitation contained in the 3rd section of the act of March 12, 1863.

The act conferring the jurisdiction upon this court in relation to the abandoned or captured property, or the recovery of the proceeds of it, by loyal owners, designates the proof that shall be made. The ownership and other requirements, in order to authorize a recovery, are to be proved to the satisfaction of the Court of Claims. This we have not construed as conferring upon us an arbitrary authority, but only the right to exercise a sound and legal discretion. In the case of Margaret Bond vs. The United States, (2 Court of Claims,) 532, referring to this clause, the court says: "This we hold to mean that the facts shall be established by legal and competent testimony, in the same manner that is usually practiced in courts of justice; that such testimony shall be taken before a competent officer or magistrate, on legal notice to the solicitor of the United States, under the solemnity of an oath, and subject to a cross-examination under such rules as the court has prescribed. The evidence of ownership of the property required is at least equal to that necessary to sustain an action of trespass or trover. The ownership must be a *bona fide* one, not collusive or colorable." "We hold that wherever one individual has sold

and the other purchased, to prevent the property from being seized by and forfeited to the United States, the ownership is not genuine." To the principles here laid down we have strictly adhered. Upon a full and careful review we are satisfied with the doctrine there announced, and until we shall be further directed or instructed will be compelled to apply the same rules to the cases that may arise.

To the principle that unchallenged and continued possession of personal property, with a claim of title to it, is *prima facie* evidence of ownership, I know of no exception. And in trespass or trover, in respect of such chattels, it being uncontradicted or rebutted by any countervailing evidence, isconclusive.

Here we have the direction of Grossmayer to Einstein to make the purchase. We have the notification of Einstein, after making the purchase, to Grossmayer, and the latter's consent and approval of it. We have the fact, that it is shipped and directed to be stored for the use of Grossmayer, and that it was so done.

The United States afterwards seize it in the name of Grossmayer, and ship and sell it. We think all this, unexplained and uncontradicted, is proof of ownership, and should be "to the satisfaction" of any court, that bases it decisions upon the ordinary probabilities of human testimony. We therefore hold that he has proved that he was the owner of the property in question.

II. Does the proof of his loyalty come up to the requirements of the acts of Congress? On this subject the act of March 12, 1863, § 3, requires that he shall prove to the satisfaction of this court, "that he has never given any aid or comfort to the present rebellion." The act of June 25, 1868, § 3, provides "that whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant or party asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion, and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be *prima facie* evidence that such person did give aid and comfort to said rebellion, and to the persons engaged therein."

This latter act, it is alleged, has imposed additional and much more stringent conditions of recovery than the act of 1863.

We have been unable to view the act in that light. We do not think that the act of 1868 imposes any new conditions of recovery. If it did, it would be obnoxious to the charge of being either an *ex post facto*, or a retrospective statute. In the one case it would be unconstitutional, in the other unjust. And before any court is justified in coming to either conclusion, or giving to the law a construction which will lead to the one or the other, it must be convinced, that the words and terms used admit of no other interpretation. (See Dw. on stat. 536, 540; Churchill *vs.* Crease, 5 Bingham, 178, and Torrington *vs.* Hargroves, id. 492. In Rex *vs.* Smith and others,

Dougl. 141, it was held that "it cannot be presumed that the statute was to have a retrospect, so as to take away a right of action which the plaintiff was entitled to before the time of its commencement." And see Attorney General *vs.* Lloyd, 3 Atk. 541; Same *vs.* Andrews, 1 Ves. Sen. 225.

This is the settled doctrine of the Supreme Court of the United States, McEwen *vs.* Bulkley, 26 How., 242; Harvey *vs.* Tyler, 3 Wall., 329.) But we do not think that the act can, in accordance with the settled rules of interpretation, be held to have intended to introduce in the trial of these cases new grounds of forfeiture, new conditions of recovery, or new rules of evidence, by any enactment contained in this 3rd section of the act of 25th June, 1868. If it laid either additional grounds of forfeiture or imposed new conditions of recovery, both operating as punishment for past offences, it would be a direct infraction of the Constitution. In the case of *ex parte* Garland, 4 Wall , 333;) the Supreme Court hold, that "exclusion from the practice of the law in the federal courts, or from any of the ordinary avocations for past conduct, is punishment for such conduct. The exaction of the oath was intended only to ascertain upon whom the act is intended to operate." And is not the disability to sue in a federal court, imposed for past conduct, a punishment for a past offence? The evidence required would be the mere mode of ascertaining the person upon whom this *ex post facto* penalty is to be inflicted; nor can it be said that it merely affects the power and jurisdiction of the court to render a judgment in favor of such a person. The disability, if it exist, is not in the court, it is in the party. But in our judgment the act contemplates no new penalty, nor any essential change of the evidence required, to authorize a recovery under the act of 1863, but to extend the same mode and measure of proof to all cases andall courts where the loyalty or disloyalty of any person may be in question. Every section in this law is made to apply specially, and in direct terms, to the Court of Claims and to it alone, except this third section. And by this, instead of changing to any extent either the mode or measure of proof heretofore required in these cases, in this court, Congress has adopted our rules, given them the sanction of positive law, and extended them to all the other courts of the country. It was of the utmost importance there should be a general and uniform rule throughout the United States. The question is recurring every day, in all parts of the country, as to the loyalty of persons. What it consisted in had not before been defined in any authoritative manner. Different persons and different courts had different standards. Some required more, others less proof, to establish loyalty. To obviate this diversity and uncertainty, Congress has interposed and presented a just and uniform standard to which all must conform. Under the act of 1863 the condition of recovery was that he should prove "that he had never given any aid or comfort to the rebellion."

Does the act of of 1868 impose any other condition as a ground of restoration of the proceeds of his captured property? I do not so read the statute. It says, "Whenever it shall be material, in any suit or claim before any court, to ascertain whether any person did or did

not give any aid or comfort to the late rebellion." This is the fact to be proved. This is the ground work of the forfeitures and disabilities. And here there is no change of that. But the mode of establishing this leading prominent fact, is for the first time pointed out and directed. And inasmuch as the fact that the party "never gave any aid or comfort to the rebellion," is a pure negative, and therefore incapable of direct proof, it is to be established by certain affirmative and positive sentiments and conduct in the party, and by the necessary and natural presumptions arising from them. When, under the act of 1868, it is proved that the person whose loyalty is in question, 'did during said rebellion consistently adhere to the United States," and, under that of 1863, that "he never gave any aid or comfort to the rebellion," has he not in effect proved all that both acts require? Is not aid to persons engaged in the rebellion aid to the rebellion itself? Does not the major include the minor? Is not aid to the rebellion equally aid to the persons engaged in it? Would not the undoubted proof of these two essential and leading requisites, in the absence of all countervailing facts, be at least inferential and presumptive proof that he never gave any aid or comfort to *persons* engaged in rebellion? We think a loyal man, like a truthful or honest one, ought to have the benefit of his general good conduct and character. In every doubtful case it ought to weigh in his favor. It would be unnatural, as well as cruel, to infer and believe that a man residing in the rebel territory, and who, through all the dangers and persecutions of the war, against all the promptings of interest, and the influence of friends and circumstances, had "consistently adhered to the United States," yet had all the time been secretly guilty of treason.

Nor do we think that offices and acts of affection or humanity, rendered by persons to individuals engaged in rebellion, come within the interdictions of these acts. The laws are said to be silent amid the clash of arms. But there is a law in man's higher and better nature which is always heard above the din of war. It is the law of human pity and sympathy; without this the Christian becomes a savage, and man a monster. Those men and women who, from motives of humanity and charity, on the battle-fields and in the hospitals, ministered to the weary and the wounded, the sick and the dying of the rebel and the Union soldiers alike, I think were not guilty of "giving aid and comfort to the rebellion or to the persons engaged therein," within the meaning of these acts, although, through those ministrations, many rebel soldiers may have been restored to the ranks of the insurrectionary forces. The "aid or comfort" denounced in these acts is such as forfeits a man's property, outlaws him from the courts of his country, to which loyal men have free access, deprives him of rights which they enjoy, and stamps him as guilty of, at least, incipient treason. Such legal consequences never flow from innocent motives and conduct. The "aid or comfort" which is visited with such disqualifications and penalties, are not mere indifferent facts, but vicious and criminal acts. To constitute them such they must have been committed with the intention and for the

purpose of aiding the rebellion, and promoting its power and success, or from other improper motives. To do any act which tended to support the rebellion, where no other motive is apparent or proved, is evidence of bad intention; for every man is presumed to intend the natural result of his actions. But where the whole conduct and life of a man has been consistent with his allegiance to his country, and a single act of a doubtful motive is presented, and which may have resulted from fear, affection or humanity, his character, his general character for loyalty, should turn the scale.

Taxes paid where the rebel authority held sway, contributions levied and payment extorted by the presence of a power and force that could compel submission, would all be "aid or comfort to the rebellion, or to persons engaged therein" But they were not wilful breaches of allegiance and duty, and therefore, in our opinion, do not come within the letter, the reason, the spirit or purpose of these enactments. These laws are penal, and did not intend to punish other than wilful transgression.

We must not be understood, in anything here said, as relaxing the rigid requirements of the law in relation to the proof of the allegiance and conduct of the claimant during the rebellion. The law was not made for that large class who always endeavor to be safe whichever side may win. The late rebellion was a struggle for national life or death; a venture in which the whole future of the nation was embarked. There was no middle ground which a citizen could properly occupy. "He that was not for us was against us." Neutrality was opposition, and indifference a crime. He who risked nothing in the conflict has little claim to share in the fruits of the victory. Against all such the law operates with inexorable severity; we do nothing in its administration to mitigate or avert the punishment it inflicts upon offenders. But those who risked the losses, incurred the persecutions, and braved the dangers of "true allegiance" ought not to be despoiled by their fellow victors.

Much of what has been said upon the last point does not apply to the case of the claimant, Grossmayer. He was a resident of the State of New York, and afterwards of the District of Columbia. He never resided where the "rebel force or organization held sway," hence the presumptions do not arise against him. If they have any place they are in his favor. But, in addition, he proves clearly and satisfactorily his loyal disposition and conduct. And on that subject his case is free from all doubt, tried even by the tests which the counsel for the United States insists upon applying to parties in these cases.

One more important question remains to be considered, and that arises on the limitation prescribed in the act of Congress of March 12, 1863, § 3. It is as follows: "And any person, claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims." The petition in this case was filed on the 22nd June, 1867. The United States interpose the plea of the statute; the question therefore arises

whether the claim was preferred in this court within two years after the suppression of the rebellion. The fact to be determined, therefore, is, when was the rebellion suppressed? In regard to a foreign war, commenced by a formal declaration, and ended by articles or treaty of peace, the state of war or peace is determined by those events, and admits of little question. But in a civil war or insurrection, where no such declaration or treaty obtains, there is more difficulty. It is sometimes impossible to designate, as matter of fact, the point of time, the day or hour, where the one condition of society ends and the other begins. The encroachments of usurped power may have been so gradual as to render it difficult to specify the exact time when the rightful authority of government has been displaced. And the re-establishment of the civil authority, by means of military force and operations, may be so slow and regular as to leave no well defined boundary where the one ends and the other begins. For a time, in all such cases, the civil and military hold and exercise divided sway. And this interval does not belong exclusively to either war or peace. War is no longer flagrant; but peace has not been completely restored. Can, however, the rebellion be said to have been suppressed until the civil power is reinstated? The confusion and disorder that prevailed in the rebel States after the surrender of the insurgent armies was a part of the rebellion itself. And it was as necessary to remedy and reform these as it was to overcome the armed forces, before the reign of peace, and law and order could be restored. And until that was done it could not be said "the rebellion was suppressed." This state of things existed all over the insurrectionary States, at and after the surrender of Lee and Johnson. In some places the disorder and confusion was worse than in others. In some communities this condition lasted longer, while in others it was of shorter duration. These facts greatly enhance the difficulty of deciding, as an independent and substantive fact, when the rebellion was actually suppressed. If left to be so decided in any case as it arises, no uniformity could be expected in the different courts, nor indeed in the same court. Different courts and juries and witnesses, would look at the question under different aspects and from various stand-points. Their opinions would be affected and varied from their localities, their personal bias or prejudice, or from surrounding circumstances. It appears evident to me, that Congress intended there should be a single date from which the limitation in all cases of the designated class should commence to run. This intention would be utterly defeated by the interpretation contended for.

Between this statute and ordinary acts of limitations there is a marked and peculiar difference. Ordinarily such enactments are made to operate upon individual and isolated cases. The limitation is measured in each case by its own facts. Here the limitation is made to operate upon a whole class of cases alike; not from any fact existing in any of the cases themselves, but dating from an incident in the history of the nation; and this incident or fact, not marked in point of time by anything precise or definite. These difficulties are

greatly magnified when we consider the large communities, the great extent of territory affected by the rebellion, and the slow and gradual means by which it was finally suppressed.

These and many other considerations convince me that Congress never intended to impose the duty of deciding the question upon us or upon any other court. "The suppression of the rebellion" describes a political condition, and not a judicial fact. That condition can only be defined and determined by the political departments of the government; and their decision is not only binding but conclusive upon the judiciary. It resolves itself into a question of peace or war; and the right to make the one and declare the other are among the express and enumerated constitutional prerogatives of Congress. No special mode of exercising this power is prescribed by the Constitution. Hence it may be in any way not forbidden by that instrument. War may be commenced by a direct legislative act; or the acts of the President leading to open hostilities may be recognized and adopted. The effect in either case is the same. Such was the case when, by the act of May 13, 1846, Congress declared that war existed by the act of Mexico. This was held to be a full sanction of the President's acts, by which the battles of Palo Alto and Resaca de la Palma had occurred. (Prize Cases, 2 Black, 668.) So in the opening of the war of the rebellion, the President exercised his power under the acts of February 28, 1795, and March 3, 1807, to call out the militia of the States, and to use the land and naval forces of the nation to put down resistance to the laws, and to suppress the insurrection. This was done by proclamation of 15th April, 1861, and on the 19th and 27th of the same month a blockade of the southern ports was declared. By a further proclamation on May 3, 1861, a number of volunteer regiments were called out, and the regular army increased. Still another proclamation on May 10. 1861, declared martial law on the coast of Florida, and authorized certain military commanders to suspend there the writ of habeas corpus. All these acts were done prior to the meeting of Congress. When Congress convened on the 4th July following, these acts of the President were promptly ratified and adopted. One of the first of the measures of Congress was the act of July 13, 1861, "To provide for the collection of duties on imports," &c. In the 5th section of this act it is provided, that under the conditions and exigencies therein recited, "it shall and may be lawful for the President, by proclamation, to declare that the inhabitants of any State, or any section or part thereof, where such insurrection exists, *are in a state of insurrection against the United States*," (12 Stat., 257.) By the 6th section of the Act 29 July, 1861, (12 Stat., 281,) Congress defines in advance what shall be considered "a suppression of the rebellion," by declaring that the enlarged military establishment created by the act is "to be for service during the existing rebellion; and within one year after the constitutional authority of the government of the United States shall be re-established, and organized resistance to such authority shall no longer exist," then the military establishment may be reduced, &c. By a supplement to the act of July 13,

1861, above recited, approved July 31, 1861, Congress enacted, "that the power of the President to declare the inhabitants of any State, or any part thereof, in a state of insurrection, as provided in the fifth section of the act to which this is an addition, shall extend to and include the inhabitants of any State, or part thereof, where such insurrection against the United States shall be found by the President at any time to exist," (12 Stat., 284.)

By the 3rd section of the act of August 6, 1861, (12 Stat. 326,) these acts, orders, and proclamations of the President are approved, legalized, and made valid, the same as if they had been done under the express authority and direction of Congress. Again by the 2nd section of the Act of June 7th, 1862, (12 Stat. 422,) the President is again authorized by Congress, by proclamation, to "declare in what States and parts of States said insurrection exists." Prior to this act, on the 12 May, 1862, the President had, by proclamation, declared the ports of New Orleans, Beaufort, and Port Royal open, and the blockade removed, "except as to persons, things, and information contraband of war."

In pursuance of the Act of June 7, 1862, above recited, the President issued his proclamation, dated July 1, 1862, designating certain States and parts of States, and declaring that they "are now in insurrection and rebellion, and by reason thereof the civil authority of the United States is obstructed," &c. (12 Stat. 1,266.)

By the emancipation proclamation of January 1, 1863, the President again designates the States, or parts of States, in rebellion. (12 Stat., 1,269.)

On Sept. 15, 1863, by proclamation, the writ of habeas corpus was suspended throughout the United States. (13 Stat., 734.)

December 8, 1863, the President issued an amnesty proclamation to such as should return to their allegiance, &c. (13 Stat., 737.)

July 5th, 1864, by a special proclamation, martial law was declared in Kentucky, and the writ of habeas corpus suspended. (13 Stat., 743.) And by a subsequent proclamation, October 12th, 1865, martial law was declared at an end in the same State, and to be longer in force. (13 Stat., 773.)

So by proclamation of November 19, 1864, the blockade of Norfolk, Fernandina and Pensacola was raised after December 1st, 1864, *except* "*as to contraband of war.*" (13 Stat., 750.)

Feb'y 8th, 1865, a joint resolution of Congress excluded from the electoral college Virginia, South Carolina, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee. The proclamation of the 10th May, 1865, (13 Stat., 757,) recites that "armed resistance to the authority of this government in the insurrectionary States may be regarded as virtually at an end, and the persons by whom that resistance, as well as the operations of insurgent cruisers was directed, are fugitives or captives."

On May 22, 1865, another proclamation opened the ports east of the Mississippi, and removed restrictions on trade, except "'*in contraband of war,*" &c. (13 Stat., 758.)

May 29, 1865, the President issued an amnesty proclamation, ex-

cluding from its benefits fourteen enumerated classes of persons, and recites that to the end "that the authority of the government of the United States may be restored, and that peace, order, and freedom may be established," &c. (13 Stat., 758.)

On the same day a military or provisional governor was appointed for the State of North Carolina. The proclamation recites that the rebel organized and armed forces have "been almost entirely overcome," but the rebellion has, in its revolutionary progress, now deprivedthe people of North Carolina of all civil government," &c. (13 Stat., 760.)

A proclamation in the same words appointed a provisional governor, &c., for Mississippi. (13 Stat., 761.)

By proclamation June 13, 1865, (13 Stat., 763,) all restrictions upon trade east of the Mississippi river are removed, *except "as to contraband of war."* The rebellion in Tennessee is declared to be suppressed, and the disabilities and disqualifications upon the inhabitants of that State are removed, but not to impair "*existing regulations for suspension of habeas corpus, and the exercise of military law in cases where it shall be necessary for the general public safety and welfare during the existing insurrection.*" (13 Stat., 763.) June 17, 1865, by two proclamations provisional governors for Georgia and Texas, and June 21, 1865, for Alabama in the same words almost as that of North Carolina and others above recited. (13 Stat. 767.) On June 23, 1865, the blockade is removed from the ports, and they opened on the terms recited in proclamation of May 22, 1865, excepting "contraband of war."'

May 24, 1865, restrictions on trade west of the Mississippi river removed, except "as to the transportation thereto or therein on private account *of arms, ammunition, all articles from which ammunition is made*, gray uniforms and gray cloth," &c. (13 Stat. 769,) June 30, 1865, and July 13, 1865, provisional governors appointed for South Carolina and Florida respectively. (13 Stat. 770–1.)

By a proclamation dated August 29, 1865, former proclamations are so modified as to allow articles contraband of war to be taken into the rebel States; "*under such regulations as the Secretary of the Treasury might prescribe.*" (13 Stat. 772.) December 1, 1865. The suspension of the writ of habeas corpus revoked, except as to the States of Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississisppi, Louisiana, Arkansas, and Texas, the District of Columbia and the Territories of New Mexico and Arizona. (13 Stat. 774.)

On April 2, 1866, the President issued a proclamation declaring that "the insurrection which existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida, *is at an end and is henceforth so to be regarded.*"

August 20, 1866, the President issued a final proclamation, in which he recited former proclamations, and declares the insurrection in Texas at an end, and adds, "And I do further proclaim that the said insurrection is at an end, and that peace, order, tranquillity and

civil authority now exists in and throughout the whole of the United States of America." (14 Stat. 817.)

By the act of July 24, 1866, Tennessee was readmitted into the Union, and it was enacted, That the State of Tennessee is hereby restored to her former proper, practical relations to the Union, and is again entitled to be represented by senators and representatives in Congress. On July 16, 1866, (14 Stat. 173,) the act "to establish a bureau for the relief of freedmen," &c., of the 3rd March, 1865, was continued in force for two years from the date of the latter act—and by the 14 sect. p p. 176–7 it is provided "That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall be restored in such relations, and shall be duly represented in Congress of the United States," certain rights are secured to all citizens without respect to race or color, or previous condition of slavery. And until the State is so restored military protection and jurisdiction over all such questions are conferred and extended through the officers of the bureau.

The act March 2, 1867, (14 Stat. 428,) entitled "An uct to provide for the more efficient government of the rebel States," recites in the preamble, "Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established." Then, by the enactments, the rebel States named are to "be divided into military districts, and made subject to the military authority of the United States," &c. This condition of things is to continue in the respective rebel States until certain prescribed conditions shall have been complied with, and they severally be entitled to representation in Congress. By an act of the same March 2, 1867, (14 Stat. 432,) Congress enacted "That all acts, proclamations and orders of the President of the United States, or acts done by his authority or approval after the fourth of March, anno Domini eighteen hundred and sixty-one, and before the first day of July, 1866, respecting martial law, military trials by court-martial or military commissions, or the arrest, imprisonment and trial of persons charged with participation in the late rebellion against the United States," &c., are legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, &c., had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted, and expressly authorizing and directing the same to be done." But the act which is most directly and completely pertinent to this discussion is that of March 2, 1867, (§ 2, 14, Stat. 422.) This section declares "That section one of the act entitled 'An act to increase the pay of soldiers in the United

States army, and for other purposes,' approved June twenty, eighteen hundred and sixty-four, be, and the same is hereby continued in full force and effect for three years from and after the close of the rebellion, as announced by the President of the United States, by proclamation bearing date the twentieth day of August, eighteen hundred and sixty-six.'"

I have thus, at the risk of making this opinion tedious and prolix, attempted to group the acts of Congress and the proclamations of the President which appeared to me to bear more directly on this question. In this retrospect, the careful observer cannot fail to be struck with the harmony and accord of these high functionaries upon all questions relating to the rebellion and its final suppression. They have, not only by their separate but by their joint and concurrent action, most definitely and positively fixed the time. That action gives to it the force and sanction of positive law.

In the first place, every act and proclamation on this subject since the 13th July, 1861, had the authority of that act, and of those of 31st July, 1861, and June 2, 1862. The power conferred in those statutes, to declare from time to time what States or parts of States were in rebellion, necessarily carried with it the power, when the rebellion was suppressed in any State or part of a State, so to proclaim it. It was a necessary adjunct of the large discretion conferred in those statutes. Accordingly we find that the President, throughout the whole period of the war, exercised this power, either with the tacit permission or express approval of Congress. Conceding to Congress alone the right to define and declare the political *status* of the several States in their relations to the national government, yet it will not be contended that there is any fixed and prescribed method by which they must act. They may do it by the passage of a law; they may authorize the Executive to act for them; or finally they may ratify and adopt what he has already done. The effect is the same in either case. Whether in issuing the proclamations of April 2, 1866, and August 20, 1866, the President exercised the discretion the law vested in him wisely and well, is of no account in the case. The law conferred upon him the power to decide in the premises, and gave to no other department the right to review his decision. (See Martin vs. Mott, 12 Wheat., 19; Marbury vs. Madison, 1 Cranch, 137.) But in our case we have not only precedent plenary authority, but subsequent ratification and adoption, with full knowledge of what had been done. No recognition could have been more marked and explicit. Act of June 20, 1864, (§ 1, 144, 13 Stat.) enacted, "That on and after the 1st May, 1864, *and during the continuance of the present rebellion*, the pay per month of non-commissioned officers and privates in the military service shall be as follows," &c. It therefore became alike the duty and the interest of the government to define and determine when the increased rate of pay given by this act should cease. The President had fixed that limit on the 20th August, 1866. The War Department adopted this proclamation, and paid the soldiers at the lower rate, allowed before the act of 1864, holding that it had expired by its own limitation. And then Congress, in this

act of March 2, 1867, distinctly adopts the 20th of August, 1866, as the day the event happened upon which the provision quoted from the act of 1864 expired. And the law is thereupon "continued in full force for three years *from and after the close of the rebellion*," as announced by the President in the proclamation already quoted, of August 20, 1866.

No direct enactment, no form of words could be more explicit and emphatic than the mode and manner of its adoption. Congress has made the proclamation its own announcement of peace. We should suppose such action would have been deemed conclusive.

But arguments of great ability and learning have been addressed to us to show that it should not be so considered. But the convictions of a majority of us have not been shaken. We do not think we have any right to decide the question. It has been confided to other departments. They have not disagreed on the subject; on the contrary, they have fully concurred. They have not neglected or refused to act, but have by their separate, their concurrent, and their joint action, united in the final determination of the question. And we have neither the power nor the inclination to disturb it.

The only question that remains is, whether this action of the political departments binds the courts, or whether each court before which it arises may, in each case, decide it for itself? The answer to this question depends on whether the matter to be ascertained is a political condition, or an ordinary fact. If the former, it is entirely outside the province of the judiciary—if the latter it belongs to the court. And this must be determined from the nature of the point to be decided. In this case it is whether a civil war did or did not exist at a certain time. That this is a matter for the political departments alone, and that the judiciary must follow and obey their decisions is abundantly fortified by leading authorities in this and other countries. I shall content myself by referring to, and making some citations from, the well considered judgments of the Supreme Court of the United States upon the exact point.

In Rose *vs.* Himely, (4 Cranch, 241,) it was held that whether a revolted colony is to be treated as a sovereign State, is a political question, to be decided by governments, not by courts of justice; and the courts of the United States must consider the ancient state of things as remaining until the sovereignty of the revolted colony is acknowledged by the government of the United States.

In *Gelston* vs. *Hoyt*, (3 Wheat. 246,) the decision in *Rose* vs. *Himely* is affirmed, and Judge Story says:

"No doctrine is better established, than that it belongs exclusively to governments to recognize new States in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of *Rose vs. Himely*, (4 Cranch, 241.")

The same doctrine is held in the case of the United States *vs.* Palmer, (3 Wheat. 610,) and many other cases. In Foster *vs.* Neilson, (2 Peters

307,) Ch. J. Marshall said, "The duty of the judiciary is to decide upon individual rights, according to those principles which the political departments of the nation has established."

In *Williams* vs. *Suffolk Ins. Co.*, (13 Peters, 420,) the court says:

"And can there be any doubt that when the executive branch of the government which is charged with our foreign relations shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the Executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

In *Marbury* vs. *Madison*, 1 Cranch, 139, (1 Curtis, 368,) the following language is employed:

"By the Constitution of the United States, the President is invested with certain important political powers, in the excercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorised to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the Executive, the decision of the Executive is conclusive.

In *Astrom* vs. *Hammond*, (3 McLean 107,) Mr. Justice McLean says: "The judiciary cannot exercise a revisory proceeding over executive duties."

"In carrying a law into effect, the Executive must necessarily construe it, and it is not for this or any other court to say that there is error in the construction, and a different course must be pursued." * * * * "In all matters of discretion, and in regard to the forms of proceeding, it is clear that executive acts cannot, in any form, be drawn in question by the judicial power."

In the case of *Martin* vs. *Mott*, 12 Wheat., 19, (7 Curtis, 10,) in which the power of the President, under the act of 1795, to call out the militia in case of invasion or threatened invasion was discussed, Judge Story says:

"The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power, and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is in its terms a limited power, confined to cases of actual invasion or of imminent danger of invasion. If it be a limited power, the question arises, by whom is

the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. * * * * The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review and, in effect, defeat it. Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795."

In the case of Luther *vs.* Borden, (7 How., 1,) the court say, after reciting the 4th section of the 4th article of the Constitution of the United States:

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue, and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, not in the courts."

In the case of The Cherokees *vs.* The State of Georgia, 5 Peters, 20. There was a bill brought in in this case to restrain the State of Georgia from enforcing the laws of the State within the territory belonging, as it was alleged, exclusively to the tribe. The injunction was denied on the ground of the want of jurisdiction. Ch. J. Marshall says, "A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the State denies."

The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned. It savors too much of the exercise of political power to come within the proper province of the judicial department.

In the recent case of Mississippi *vs.* Johnson, (4 Wallace, 475,) where it was sought to restrain the President of the United States from executing the reconstruction laws, Mr. Ch. J. Chase, in delivering the opinion of the court, shows how a mere ministerial duty or function may be enforced or controlled. "Very different," says the Ch. J., "is the duty of the President in the exercise of the power to see that the laws be faithfully executed and among those laws the acts named in the bill." "The duty thus imposed is in no just sense ministerial. It is purely executive and political. An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'"

So also in the still more recent case of Georgia *vs.* Stanton, (6 Wall 50.) The Supreme Court of the United States refused to entertain jurisdiction, for the reason that "the case calls for a political judgment, and therefore will not be entertained by the court."

The very point in dispute here arose and was recently decided in the Supreme Court of the State of West Virginia, in the case of Conley *et al. vs.* The Supervisors of Calhoun county. (2 West Va. Rep. 416.)

On the 13th Feb., 1862, the general assembly of Virginia passed an act in reference to the removal of the county seat of Calhoun county; and in that provided, That it shall be lawful to open polls at the various places of voting in the county of Calhoun on the fourth Thursday in May, *after the present war is over*, for the purpose of taking the sense of the voters, &c. The vote was taken on the fourth Thursday in May, 1866. This election the court held to be void because taken before the war was over. The court says, "How are we to determine that question? It is a question to be determined by the political department of the government, and not by the judicial." And held, that the proclamation of August 20, 1866, was the end of the war, and that, being a public act, the courts are bound to take judicial notice of and are concluded by it.

I cannot think that in prescribing a limitation, as Congress did, in the act of March 12, 1863, it was intended to be an unsettled, roving, ambulatory thing; a matter to be mooted and contested in each individual case as it should arise, and therefore to depend upon the intelligence, means of information, or bias of the particular witnesses called in any case. Hence cases occurring in the same State, county or neighborhood, might be decided differently, according to the testimony in the particular cases. To determine the question by States is equally uncertain. While peace and order may have obtained in one part of a State, riot, confusion and bloodshed may have prevailed in another. While the courts may have been open in one district or county of a State, in another it may have required the presence and strong arm of military power to repress the smouldering fires of the rebellion. Besides, what appears to me entirely inconsistent with this partial and piece-meal suppression of the rebellion, and utterly conclusive against that view, is the fact that war and rebellion are not stationary and local in their character and

operations. So long as the rebellion raged in Texas and Arkansas, what security had we that the scene of conflict and carnage would not the next day be transferred to Louisiana or Mississippi? And when there, why not extend to Alabama and Georgia, and so kindle afresh all over the South the conflagration of civil war? But if it depended upon the actual existing fact, could it be shown that the rebellion was suppressed, and civil law and social order restored prior to the 20th of August, 1866, in Georgia, or South Carolina? Can it be pretended that life and property were secured, and the right to pursue his avocations, and to entertain and express his political views and opinions, were guaranteed to the citizen by the laws as enforced and administered by the courts there? So far from it, they were ruled and held in check by military power. Had this been removed at any time prior to August 20, 1866, these communities would again have suffered all the confusion and disorder resulting from civil war. None of these communities were deemed sufficiently recovered to be admitted to their former relations with the nation until July, 1868, when their representatives and senators were admitted to Congress.

Nor do I think that the time when the courts were opened in the insurrectionary States, has anything to do with the question here. This court was always open. And here was the only place the claim could be preferred. It is not a question of the commencement of the action, but when the right to bring it ends. The two years after the suppression of the rebellion was to give the loyal claimant ample time after the close of the war to inform himself of his rights, and procure the necessary evidence to sustain them.

But if we are to have a limitation on a sliding scale as to time, and ambulatory as to place, by what are these to be determined? Will it be affected by the *situs* of the property, or the residence of the owner? If the latter, when and how will it affect a claimant who has always resided in a loyal State? These, and many more difficulties that might be suggested, admonish us to adhere to the line of safe precedents. When we cast loose from these moorings, we are at sea, without rudder or compass; and should we escape shipwreck we would be more fortunate than wise. Government, like complicated and well adjusted machinery, while each part performs its proper and appropriate functions in the general arrangement, the movements and operations are harmonious, and the results legitimate and beneficial. But when any part becomes disarranged, or is made to perform functions to which its nature and powers are not adapted, its operations become disordered and confused, and its results abortive or destructive.

A majority of the court hold that the rebellion was suppressed on the 20th day of August, 1866; and this suit having been preferred to this court within two years from that date, the claim is not barred by the statute of limitations.

It is further ordered, adjudged and decreed here, that the claimant do have and recover of and from the United States, the sum of eight thousand and forty dollars and ninety-six cents, ($8,040 96).

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In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, *Appellants*,
vs.
HENRY GROSSMEYER. } No. 370.

Appeal from the Court of Claims.

Opinions delivered in the court below.

ROB: S. HALE,
Special Counsel for U. S.

CASEY, Ch. J., delivered the opinion of the court:

The claimant in this case is a citizen of the United States, and resides in the city of Washington, in the District of Columbia. He claims to have at all times borne true allegiance to the government of the United States, and avers he has never aided, abetted, or given encouragement to rebellion against the same. He further avers, that on or about the first day of October, A. D. 1864, he was the owner of forty-eight bales of cotton, stored in the city of Savannah, in the State of Georgia, and that upon the surrender of that city to the forces of the United States, this cotton belonging to him was seized by the millitary, turned over to the United States cotton agent, and by him shipped to New York, and was sold and the net proceeds were paid into the Treasury of the United States. He prays a judgment under the 3d section of the act of March 12, 1863, for such net proceeds.

* * * * * *

On the merits of this case we find the following facts: Prior to the rebellion, the claimant, Grossmeyer, was a

resident of the city of New York. Elias Einstein, a friend of his, resided and was engaged in business in Macon, in the State of Georgia. Grossmeyer had on several occasions advanced money to Einstein for the purchase of cotton on joint venture, and also advanced various sums to him as loans. At the breaking out of the rebellion there were several thousand dollars due from Einstein to Grossmeyer. By a witness, Waxelbaum, who passed back and forth several times between Macon and New York, the parties communicated with each other. Grossmeyer directed Einstein to purchase cotton for him with the money in his hands, or that he owed him, and hold it for him until after the war. Einstein made a purchase of forty-eight bales, sent notice back by Waxelbaum that he had done so, and after some time shipped it to Epstein, to Savannah, and directed him to have it stored for Grossmeyer. He placed it in a warehouse in Savannah, but not in the name of Grossmeyer, as he swears it would have been seized and confiscated by the rebel authorities, had he done so. This cotton remained in Savannah until its capture by Sherman's army in December, 1864. It was then, with the other cotton found in that city, shipped to New York, to Simeon Draper, the cotton agent, and was sold, and the net proceeds were paid into the Treasury of the United States. These net proceeds amount to the sum of $8,040 96. This suit is brought to recover these proceeds, and his petition was filed on the 22d June, 1867.

The claimant has proved that he never resided at any time "where the rebel force or organization held sway;" that he never gave any aid or comfort to the rebellion, and that he did, during said rebellion, consistently adhere to the United States.

The special counsel for the United States interposes several objections to the claimant's recovery:

1st. That he has not proved his ownership, as required by the 3d section of the act of March 12, 1863.

2d. That he has not proved his loyalty, as required by the 3d section of the act of June 25, 1868, and March 12, 1863.

3d. That the claim not having been preferred in the Court of Claims within two years after the suppression of the rebellion, it is barred by the limitation contained in the 3d section of the act of March 12, 1863.

I. The act conferring jurisdiction upon this court in relation to abandoned or captured property, or the recovery of the proceeds of it by loyal owners, designates the proof that shall be made. The ownership and other requirements, in order to authorize a recovery, are to be proved to the satisfaction of the Court of Claims. This we have not construed as conferring upon us an arbitrary authority, but only the right to exercise a sound and legal discretion. In the case of Margaret Bond *vs.* The United States, (2. C. Cls. R., p. 532,) referring to this clause, the court says: "This we hold to mean, that the facts shall be established by legal and competent testimony, in the same manner that is usually practiced in courts of justice; that such testimony shall be taken before a competent officer or magistrate, on legal notice to the solicitor of the United States, under the solemnity of an oath, and subject to a cross-examination under such rules as the court has prescribed. The evidence of ownership of the property required, is at least equal to that necessary to sustain an action of trespass or trover. The ownership must be a *bona fide* one, not collusive or colorable." "We hold that wherever one individual has sold and the other purchased, to prevent the property from being seized by and forfeited to the United States, the ownership is not genuine." To the principles here laid down, we have strictly adhered. Upon a full and careful review, we are satisfied with the doctrine there announced, and until we shall be further directed or instructed, will be compelled to apply the same rules to the cases that may arise.

To the principle that unchallenged and continued possession of personal property, with a claim of title to it, is *prima facie* evidence of ownership, I know of no exception. And in trespass or trover, in respect to such chattels, it being uncontradicted or rebutted by any countervailing evidence, is conclusive.

Here we have the direction of Grossmeyer to Einstein to make the purchase. We have the notification of Einstein, after making the purchase, to Grossmeyer, and the latter's consent and approval of it. We have the fact, that it is shipped and directed to be stored for the use of Grossmeyer, and that it was so done.

The United States afterwards seize it in the name of Grossmeyer and ship and sell it. We think all this, unex-

plained and uncontradicted, is proof of ownership, and should be "to the satisfaction" of any court that bases its decisions upon the ordinary probabilities of human testimony. We therefore hold that he has proved that he was the owner of the property in question.

* * * * * * * *

III. One more important question remains to be considered, and that arises on the limitation prescribed in the act of Congress of March 12, 1863, § 3. It is as follows: "And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims." The petition in this case was filed on the 22d of June, 1867. The United States interpose the plea of the statute. The question, therefore, arises whether the claim was preferred in this court within two years after the suppression of the rebellion. The fact to be determined, therefore, is, when was the rebellion suppressed? In regard to a foreign war, commenced by a formal declaration and ended by articles or treaty of peace, the state of war or peace is determined by those events, and admits of little question. But in a civil war or insurrection, where no such declaration or treaty obtains, there is more difficulty. It is sometimes impossible to designate, as matter of fact, the point of time, the day or hour, where the one condition of society ends and the other begins. The encroachments of usurped power may have been so gradual as to render it difficult to specify the exact time when the rightful authority of Government has been displaced. And the re-establishment of the civil authority, by means of military force and operations, may be so slow and regular, as to leave no well-defined boundary where the one ends and the other begins. For a time, in all such cases, the civil and military hold and exercise divided sway. And this interval does not belong exclusively to either war or peace. War is no longer flagrant, but peace has not been completely restored. Can, however, the rebellion be said to have been suppressed, until the civil power is reinstated? The confusion and disorder that prevailed in the rebel States after the surrender of the insurgent armies was a part of the rebellion itself. And it was as necessary to remedy and reform these, as it was to overcome the armed forces, before

the reign of peace, and law and order could be restored. And until that was done, it could not be said "the rebellion was suppressed." This state of things existed all over the insurrectionary States, at and after the surrender of Lee and Johnson. In some places the disorder and confusion was worse than in others. In some communities this condition lasted longer, while in others it was of shorter duration. These facts greatly enhance the difficulty of deciding, as an independent and substantive fact, when the rebellion was actually suppressed. If left to be so decided in any case as it arises, no uniformity could be expected in the different courts, nor, indeed, in the same courts. Different courts, and juries, and witnesses, would look at the question under different aspects and from various stand-points. Their opinions would be affected and varied from their localities, their personal bias or prejudice, or from surrounding circumstances. It appears evident to me that Congress intended there should be a single date from which the limitation in all cases of the designated class should commence to run. This intention would be utterly defeated by the interpretation contended for.

Between this statute and ordinary acts of limitations there is a marked and peculiar difference. Ordinarily such enactments are made to operate upon individual and isolated cases. The limitation is measured in each case by its own facts. Here the limitation is made to operate upon a whole class of cases alike; not from any fact existing in any of the cases themselves, but dating from an incident in the history of the nation, and this incident or fact not marked in point of time by anything precise or definite. These difficulties are greatly magnified, when we consider the large communities, the great extent of territory affected by the rebellion, and the slow and gradual means by which it was finally suppressed.

These and many other considerations convince me that Congress never intended to impose the duty of deciding the question upon us or upon any other court. "The suppression of the rebellion" describes a political condition, and not a judicial fact. That condition can only be defined and determined by the political departments of the Government, and their decision is not only binding but conclusive upon the judiciary. It resolves itself into a question of peace or war; and

the right to make the one and declare the other, are among the express and enumerated constitutional prerogatives of Congress. No special mode of exercising this power is prescribed by the Constitution. Hence it may be in any way not forbidden by that instrument. War may be commenced by a direct legislative act; or the acts of the President leading to open hostilities may be recognized and adopted. The effect in either case is the same. Such was the case when, by the act of May 13, 1846, Congress declared that war existed by the act of Mexico. This was held to be a full sanction of the President's acts, by which the battles of Palo Alto and Resaca de la Palma had occurred. (Prize Cases, 2 Black, 668.) So, in the opening of the war of the rebellion, the President exercised his power under the acts of February 28, 1795, and March 3, 1807, to call out the militia of the States, and to use the land and naval forces of the nation to put down resistance to the laws, and to suppress the insurrection. This was done by proclamation of 15th April, 1861, and on the 19th and 27th of the same month a blockade of the southern ports was declared. By a further proclamation, on May 3, 1861, a number of volunteer regiments were called out, and the regular army increased. Still another proclamation, on May 10, 1861, declared martial law on the coast of Florida, and authorized certain military commanders to suspend there the writ of *habeas corpus*. All these acts were done prior to the meeting of Congress. When Congress convened, on the 4th of July following, these acts of the President were promptly ratified and adopted. One of the first of the measures of Congress was the act of July 13, 1861, "to provide for the collection of duty on imports," &c. In the 5th section of this act it is provided, that under the conditions and exigencies therein recited, "it shall and may be lawful for the President, by proclamation, to declare that the inhabitants of any State, or any section or part thereof, where such insurrection exists, *are in a state of insurrection against the United States*," (12 Stat. L., p. 257.) By the 6th section of the act July 20, 1861, (12 Stat. L., p. 281,) Congress defines, in advance, what shall be considered a "suppression of the rebellion," by declaring that the enlarged military establishment created by the act is "to be for service during the existing rebellion; and within one year after the constitutional authority

of the government of the United States shall be re-established, and organized resistance to such authority shall no longer exist," then the military establishment may be reduced, &c. By a supplement to the act of July 13, 1361, above recited, approved July 31, 1861, Congress enacted, "that the power of the President to declare the inhabitants of any State, or any part thereof, in a state of insurrection, as provided in the 5th section of the act to which this is an addition, shall extend to and include the inhabitants of any State, or part thereof, where such insurrection against the United States shall be found by the President at any time to exist." (12 Stat. L., p. 284.)

By the 3d section of the act of August 6, 1861, (12 Stat. L., p. 326,) these acts, orders, and proclamations of the President are approved, legalized, and made valid, the same as if they had been done under the express authority and direction of Congress. Again, by the 2d section of the act of June 7, 1862, (12 Stat. L., p.422,) the President is again authorized by Congress, by proclamation, to "declare in what States and parts of States said insurrection exists." Prior to this act, on the 12th May, 1862, the President had, by proclamation, declared the ports of New Orleans, Beaufort, and Port Royal open, and the blockade removed, "except as to persons, things, and information contraband of war."

In pursuance of the act of June 7, 1862, above recited, the President issued his proclamation, dated July 1, 1862, designating certain States and parts of States, and declaring that they "are now in insurrection and rebellion, and by reason thereof the civil authority of the United States is obstructed," &c. (12 Stat. L., p. 1266.)

By the emancipation proclamation of January 1, 1863, the President again designates the States, or parts of States, in rebellion. (12 Stat. L., p. 1269.)

On September 15, 1863, by proclamation, the writ of *habeas corpus* was suspended throughout the United States, (13 Stat. L., p 734.)

December 8, 1863, the President issued an amnesty proclamation to such as should return to their allegiance, &c. (13 Stat., p. 737.

July 5, 1864, by a special proclamation, martial law was declared in Kentucky, and the writ of *habeas corpus* sus-

pended. (13 Stat. L., p.743.) And by a subsequent proclamation, October 12, 1865, martial law was declared at an end in the same State, and to be no longer in force. (13 Stat. L., p. 773.)

So. by proclamation of November 19, 1864, the blockade of Norfolk, Fernandina, and Pensacola was raised after December 1, 1864, *except* "*as to contraband of war.*" (13 Stat. L., p. 750.)

February 8, 1865, a joint resolution of Congress excluded from the electoral college Virginia, South Carolina, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee. The proclamation of the 10th May, 1865, (13 Stat. L., p. 757,) recites that "armed resistance to the authority of this Government in the insurrectionary States may be regarded as virtually at an end, and the persons by whom that resistance, as well as the operations of insurgent cruisers was directed, are fugitives or captives"

On May 22, 1865, another proclamation opened the ports east of the Mississippi, and removed restrictions on trade, except "*in contraband of war*," &c. (13 Stat. L., p. 758.)

May 29, 1865, the President issued an amnesty proclamation, excluding from its benefits fourteen enumerated classes of persons, and recites that, to the end "that the authority of the government of the United States may be restored, and that peace, order, and freedom may be established," &c. (13 Stat. L., p. 758.)

On the same day a military or provisional governor was appointed for the State of North Carolina. The proclamation recites that the rebel organized and armed forces have "been almost entirely overcome," but the rebellion has, in its revolutionary progress," now deprived the people of North Carolina of all civil government," &c. (13 Stat. L., p. 760.)

A proclamation in the same words appointed a provisional governor, &c., for Mississippi. (13 Stat. L., p. 761.)

By proclamation, June 13, 1865, (13 Stat. L., p. 763,) all restrictions upon trade east of the Mississippi river are removed, *except* "*as to contraband of war.*" The rebellion in Tennessee is declared to be suppressed, and the disabilities and disqualifications upon the inhabitants of that State are removed, but not to impair "*existing regulations for*

suspension of habeas corpus, and the exercise of military law in cases where it shall be necessary for the general public safety and welfare during the existing insurrection." (13 Stat. L., p. 763.) June 17, 1865, by two proclamations, provisional governors for Georgia and Texas, and June 21, 1865, for Alabama, in the same words almost as that of North Carolina and others above recited. (13 Stat. L., p. 767.) On June 23, 1865, the blockade is removed from the ports, and they opened on the terms recited in proclamation of May 22, 1865, "excepting contraband of war."

May 24, 1865, restrictions on trade west of the Mississippi river removed, except "as to the transportation thereto or therein, on private account, *of arms, ammunition, all articles from which ammunition is made*, gray uniforms, and gray cloth," &c. (13 Stat. L., p. 769.) June 30, 1865, and July 13, 1865, provisional governors appointed for South Carolina and Florida, respectiyely. (13 Stat. L., pp. 770–1.) By a proclamation, dated August 29, 1865, former proclamations are so modified as to allow articles contraband of war to be taken into the rebel States, "*under such regulations as the Secretary of the Treasury might prescribe.*" (13 Stat. L., p. 772.) December 1, 1865, the suspension of the writ of *habeas corpus* revoked, except as to the States of Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas, the District of Columbia, and the Territories of New Mexico and Arizona. (13 Stat. L., p. 774.)

On April 2, 1866, the President issued a proclamation declaring that "the insurrection which existed in the States of Georgia, South Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida, *is at an end, and is henceforth so to be regarded.*" (14 Stat. L., p. 811.)

August 20, 1866, the President issued a final proclamation, in which he recited former proclamations, and declares the insurrection in Texas at an end, and adds, "And I do further proclaim that the said insurrection is at an end, and that peace, order, tranquillity, and civil authority now exist in and throughout the whole of the United States of America." (14 Stat. L., p. 817.)

By the act of July 24, 1866, Tennessee was readmitted into the Union, and it was enacted that the State of Tennessee is hereby restored to her former proper practical rela-

tions to the Union, and is again entitled to be represented by Senators and Representatives in Congress. On July 16, 1866, (14 Stat. L., p. 172,) the act "to establish a bureau for the relief of freedmen," &c., of the 3d of March, 1865, was continued in force for two years from the date of the latter act, and by the 14th section, pp. 176–7, it is provided, "That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall be restored in such relations, and shall be duly represented in Congress of the United States," certain rights are secured to all citizens, without respect to race or color, or previous condition of slavery. And until the State is so restored military protection and jurisdiction over all such questions are conferred and extended through the officers of the bureau.

The act March 2, 1867, (14 Stat. L., p. 428,) entitled "An act to provide for the more efficient government of the rebel States," recites, in the preamble, "Whereas no legal State governments or adequate protection for life or property now exist in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established." Then, by the enactments, the rebel States named are to "be divided into military districts, and made subject to the military authority of the United States," This condition of things is to continue in the respective rebel States until certain prescribed conditions shall have been complied with, and they severally be entitled to representation in Congress. By an act of the same, March 2, 1867, (14 Stat. L., p.432,) Congress enacted "That all acts, proclamations, and orders of the President of the United States, or acts done by his authority or approval, after the 4th of March, A. D. 1861, and before the 1st day of July, 1866, respecting martial law, military trials by court-martial, or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States," &c.,

are legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, &c., had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted, and expressly authorizing and directing the same to be done. But the act which is most directly and completely pertinent to this discussion is that of March 2, 1867, (14 Stat., 422, sec. 2.) This section declares "That section 1 of the act entitled 'An act to increase the pay of soldiers in the United States army and for other purposes,' approved June 20, 1864, be, and the same is hereby, continued in full force and effect for three years from and after the close of the rebellion, as announced by the President of the United States by proclamation bearing date the 20th day of August, 1866."

I have thus, at the risk of making this opinion tedious and prolix, attempted to group the acts of Congress and the proclamations of the President which appear to me to bear more directly on this question. In this retrospect, the careful observer cannot fail to be struck with the harmony and accord of these high functionaries upon all questions relating to the rebellion and its final suppression. They have, not only by their separate but by their joint and concurrent action, most definitely and positively fixed the time. That action gives to it the force and sanction of positive law.

In the first place, every act and proclamation on this subject since the 13th of July, 1861, had the authority of that act, and of those of 31st of July, 1861, and June 2, 1862. The power conferred in those statutes to declare from time to time what States were in rebellion necessarily carried with it the power, when the rebellion was suppressed in any State or part of a State, so to proclaim it. It was a necessary adjunct of the large discretion conferred in those statutes. Accordingly, we find that the President, throughout the whole period of the war, exercised this power, either with the tacit permission or express approval of Congress. Conceding to Congress alone the right to define and declare the political *status* of the several States in their relations to the National Government, yet it will not be contended that there is any fixed and prescribed method by which they must act. They may do it by the passage of a law; they may authorize

the Excutive to act for them; or, finally, they may ratify and adopt what he has already done. The effect is the same in either case. Whether in issuing the proclamations of April 2, 1866, and August 20, 1866, the President exercised the discretion the law vested in him wisely and well, is of no account in the case. The law conferred upon him the power to decide in the premises, and gave to no other department the right to review his decision. (See Martin *vs.* Mott, 12 Wheat., 19; Marbury *vs.* Madison, 1 Cranch, 137.) But in our case we have not only precedent plenary authority, but subsequent ratification and adoption, with full knowledge of what had been done. No recognition could have been more marked and explicit. Act of June 20, 1864, (13 Stat. L., p. 448,) enacted, "That on and after the 1st May, 1864, *and during the continuance of the present rebellion*, the pay per month of non-commissioned officers and privates in the military service shall be as follows," &c. It, therefore, became alike the duty and the interest of the Government to define and determine when the increased rate of pay given by this act should cease. The President had fixed that limit on the 20th August, 1866. The War Department adopted this proclamation, and paid the soldiers at the lower rate, allowed before the act of 1864, holding that it had expired by its own limitation. And then Congress, in this act of March 2, 1867, distinctly adopts the 20th of August, 1866, as the day the event happened upon which the provision quoted from the act of 1864 expired. And the law is thereupon "continued in full force for three years *from and after the close of the rebellion*," as announced by the President in the proclamation already quoted of August 20, 1866.

No direct enactment, no form of words, could be more explicit and emphatic than the mode and manner of its adoption. Congress has made the proclamation its own announcement of peace. We should suppose such action would have been deemed conclusive.

But arguments of great ability and learning have been addressed to us to show that it could not be so considered. But the convictions of a majority of us have not been shaken. We do not think we have any right to decide the question. It has been confided to other departments. They have not disagreed on the subject; on the contrary, they have fully concurred. They have not neglected or refused to act, but

have, by their separate, their concurrent, and their joint action, united in the final determination of the question. And we have neither the power nor the inclination to disturb it.

The only question that remains is, whether this action of the political departments binds the courts, or whether each court before which it arises may, in either case, decide it for itself? The answer to this question depends on whether the matter to be ascertained is a political condition or an ordinary fact. If the former, it is entirely outside the province of the judiciary; if the latter, it belongs to the court. And this must be determined from the nature of the point to be decided. In this case, it is whether a civil war did or did not exist at a certain time. That this is a matter for the political departments alone, and that the judiciary must follow and obey their decisions, is abundantly fortified by leading authorities in this and other countries. I shall content myself by referring to and making citations from the well-considered judgments of the Supreme Court of the United States upon the exact point.

In Rose *vs.* Himely, (4 Cranch, 241,) it was held that, whether a revolted colony is to be treated as a sovereign state is a political question, to be decided by governments, not by courts of justice; and the courts of the United States must consider the ancient state of things as remaining until the sovereignty of the revolted colony is acknowledged by the Government of the United States.

In Gelston *vs.* Hoyt, (3 Wheat., 246,) the decision in Rose *vs.* Himely is affirmed, and Judge Story says:

"No doctrine is better established than that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own Government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of Rose *vs.* Himely, (4 Cranch, 241.")

The same doctrine is held in the case of the United States *vs.* Palmer, (3 Wheat., 610,) and in many other cases. In Foster *vs.* Neilson, (2 Peters, 307,) Chief Justice Marshall said, "The duty of the judiciary is to decide upon the indi-

vidual rights, according to those principles which the political department of the nation has established."

In Williams *vs.* Suffolk Insurance Company, (13 Peters. 420,) the court says:

"And can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And, in this view, it is not material to inquire, nor is it the province of the court to determine, whether the Executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and Government of the Union."

In Marbury *vs.* Madison, (1 Cranch, 139, 1 Curtis 368,) the following language is employed:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individval rights, and being entrusted to the Executive, the decision of the Executive is conclusive."

In Astrom *vs.* Hammond, (3 McLean, 107,) Mr. Justice McLean says: "The judiciary cannot exercise a revisory proceeding over executive duties."

"In carrying a law into effect, the Executive must necessarily construe it, and it is not for this or any other court to say that there is error in the construction, and a different course must be pursued." * * * * "In all matters of discretion, and in regard to the forms of proceeding, it is clear that executive acts cannot, in any form, be drawn in question by the judicial power."

In the case of Martin *vs.* Mott, (12 Wheat., 19, 7 Curtis, 10,) in which the power of the President, under the act of 1795, to call out the militia in case of invasion, or threatened invasion, was discussed, Judge Story says:

"The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power, and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is in its terms a limited power, confined to cases of actual invasion or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. * * * * The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review and, in effect, defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795."

In the case of Luther *vs.* Borden, (7 How., 1,) the court say, after reciting the 4th section of the 4th article of the Constitution of the United States:

"Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when Senators and Representatives of a State are admitted into the

councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue, and, as no Senators or Representatives were elected under the authority of the Government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, not in the courts."

In the case of The Cherokees *vs.* The State of Georgia, (5 Peters, 20,) there was a bill brought in in this case to restrain the State of Georgia from enforcing the laws of the State within the territory belonging, as it was alleged, exclusively to the tribe. The injunction was denied, on the ground of the want of jurisdiction. Chief Justice Marshall says: "A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the State denies."

"The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned. It savors too much of the exercise of political power to come within the proper province of the judicial department."

In the recent case of Mississippi *vs.* Johnson, (4 Wallace, 475,) where it was sought to restrain the President of the United States from executing the reconstruction laws, Mr. Chief Justice Chase, in delivering the opinion of the court, shows how a mere ministerial duty or function may be enforced or controlled. "Very different," says the Chief Justice, "is the duty of the President in the exercise of the power to see that the laws be faithfully executed, and among those laws the acts named in the bill" "The duty thus imposed is in no just sense ministerial. It is purely executive and political. An attempt on the part of the judicial department of the Government to enforce the performance of such duties by the President might be justly characterized,

in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'"

So. also, in the still more recent case of Georgia *vs.* Stanton, (6 Wall., 50.) The Supreme Court of the United States refused to entertain jurisdiction, for the reason that "the case calls for a political judgment, and therefore will not be entertained by the court."

The very point in dispute here arose and was recently decided in the Supreme Court of the State of West Virginia, in the case of Conley *et al. vs.* The Supervisors of Calhoun County. (2 West Va. Rep., 416.)

On the 13th February, 1862, the general assembly of Virginia passed an act in reference to the removal of the county seat of Calhoun county, and in that provided, that it shall be lawful to open polls at the various places of voting in the county of Calhoun, on the fourth Thursday in May, *after the present war is over*, for the purpose of taking the sense of the voters, &c. The vote was taken on the fourth Thursday in May, 1866. This election the court held to be void, because taken before the war was over. The court says: "How are we to determine that question? It is a question to be determined by the political department of the Government, and not by the judicial," and held that the proclamation of August 20, 1866, was the end of the war, and that, being a public act, the courts are bound to take judicial notice of and are concluded by it.

I cannot think that in prescribing a limitation, as Congress did, in the act of March 12, 1863, it was intended to be an unsettled, roving, ambulatory thing; a matter to be mooted and contested in each individual case, as it should arise, and therefore to depend upon the intelligence, means of information, or bias of the particular witnesses called in any case. Hence, cases occurring in the same State, county, or neighborhood, might be decided differently, according to the testimony in the particular cases. To determine the question by States is equally uncertain. While peace and order may have obtained in one part of a State, riot, confusion, and bloodshed may have prevailed in another. While the courts may have been open in one district or county of a State, in another it may have required the presence and strong arm of military power to repress the smouldering fires of the rebellion. Besides, what appears to me entirely in-

consistent with the partial and piecemeal suppression of the rebellion, and utterly conclusive against that view, is the fact that war and rebellion are not stationary and local in their character and operations. So long as the rebellion raged in Texas and Arkansas, what security had we that the scene of conflict and carnage would not the next day be transferred to Louisiana or Mississippi? And when there, why not extend to Alabama and Georgia, and so kindle afresh all over the South the conflagration of civil war? But if it depended upon the actual existing fact, could it be shown that the rebellion was suppressed, and civil law and social order restored prior to the 20th of August, 1866, in Georgia or South Carolina? Can it be pretended that life and property were secured, and the right to pursue his avocations, and to entertain and express his political views and opinions, were guaranteed to the citizen by the laws as enforced and administered by the courts there? So far from it, they were ruled and held in check by military power. Had this been removed at any time prior to August 20, 1866, these communities would again have suffered all the confusion and disorder resulting from civil war. None of these communities were deemed sufficiently recovered to be admitted to their former relations with the nation until July, 1868, when their Representatives and Senators were admitted to Congress.

Nor do I think that the time when the courts were opened in the insurrectionary States has anything to do with the question here. This court was always open, and here was the only place the claim could be preferred. It is not a question of the commencement of the action, but when the right to bring it ends. The two years after the suppression of the rebellion were to give the loyal claimant ample time after the close of the war to inform himself of his rights, and procure the necessary evidence to sustain them.

But if we are to have limitation on a sliding scale as to time, and ambulatory as to place, by what are these to be determined? Will it be affected by the *situs* of the property, or the residence of the owner? If the latter, when and how will it affect a claimant who has always resided in a loyal State? These, and many more difficulties that might be suggested, admonish us to adhere to the line of safe precedents. When we cast loose from these moorings, we are at sea, without rudder or compass; and should we escape ship-

wreck, we would be more fortunate than wise. Government, like complicated and well-adjusted machinery, while each part performs its proper and appropriate functions in the general arrangement, the movements and operations are harmonious, and the results legitimate and beneficial. But when any part becomes disarranged, or is made to perform functions to which its natures and powers are not adapted, its operations become disordered and confused, and its results abortive or destructive.

A majority of the court hold that the rebellion was suppressed on the 20th day of August, 1866; and this suit having been preferred to this court within two years from that date, the claim is not barred by the statute of limitations.

It is further ordered, adjudged, and decreed here, that the claimant do have and recover of and from the United States the sum of eight thousand and forty dollars and ninety-six cents, ($8,040 96.)

NOTT, J., dissenting:

This is the first case decided by this court under the "*Abandoned or captured property act*," since an appeal to the Supreme Court in such cases has been given by act 25th June, 1868, (15 Stat. L., c. 71.) When the "*Abandoned or captured property act*" was first before us in conference, my views went somewhat further than those announced by the court in *Margaret Bond's Case*, but, inasmuch as no appeal then lay from the decision of this court, and inasmuch as I agreed with the general principles stated in *Margaret Bond's Case*, so far as they went, I thought it best not to encumber the record with useless opinions, but to aid my brethren in giving effect to the law as they construed it. The right of appeal now being extended to this class of cases, I shall state briefly the precise construction I gave and still give to the statute.

The "*Abandoned or captured property act*" is not a contract, but is a compact. Its violation through subsequent legislation will not involve the defendants in damages, other than that dishonor which attaches to governments that do not keep faith with those to whom they proffer promises. Subsequent statutes may therefore change the terms upon which claimants may recover the proceeds of their own

property; but such a construction cannot be placed upon an act of Congress, unless its words are so plain and unequivocal as to leave to the court no other alternative.

By this compact, Congress said to their loyal adherents within the insurrectionary States, "Remain faithful in your allegiance to the United States to the end of the struggle; give neither aid nor comfort to our common enemy; and if our armies by an evil chance capture your property, it shall be restored. The Government cannot retain all captured property to restore it in that form; therefore it shall be sold, and the net proceeds paid to you instead. The Government cannot now, in the midst of war, inquire into your loyalty or your ownership; therefore, within a reasonable period after the war has ended, this shall be done. A tribunal of our own creating shall be the umpire, and when it establishes the fact of your loyalty, whatever the Government possesses of yours shall be restored to you again."

That the captured or abandoned property fund is a trust is a fact vital to an understanding of that statute. On the one hand, the error which has crept within the last year into the public press, and even into the halls of Congress, that this court is being overwhelmed with cotton cases, and that its judgments in such cases may embarrass the Treasury, can have no existence in fact; for these suits are but equitable proceedings against this fund, and if the suits are of great number, so must be the several parcels of net proceeds. There can be no more judgments than there are parcels of cotton, or its proceeds, in the Treasury; and if the court had rendered judgment for the claimants in every case, they could take nothing out of the Treasury which was not already in this trust fund. On the other hand, a claimant under this act cannot set up the value of the property captured, as some have sought to do; nor content himself with showing that the proceeds "ought to be in the Treasury," as in several instances has been attempted; nor recover damages of the Government for the loss of his property by the negligence of the public officers, or the culpable frauds and malpractices of some of the defendant's agents. All that he can do is, to say and to show that the defendants now hold in trust for him, one of their loyal citizens, a certain fund, which is the proceeds, or a part of the proceeds, of specific property, of which they voluntarily assumed the

control and the guardianship. Whether the property brought little or much, whether the proceeds were wickedly squandered or faithfully kept, whether the capture was unlawful and the proceedings irregular, are questions foreign to the suit; it is simply a proceeding in equity to recover a specific thing, and that specific thing is the fund now actually remaining in the Treasury.

And from these two conclusions may be drawn a third, which is that this court is powerless to give greater or other relief. It has no authority to make the Government pay for the frauds done by its agents; and it is specially restrained by statute from entertaining jurisdiction of cases growing out of the "appropriation" of property by the army or navy. (Act 4th July, 1864, 13 Stat. L., p. 381.) If it were to give a claimant a decree for more than he has in the Treasury, the decree would be void to that extent for want of jurisdiction. The Secretary of the Treasury could not pay out money which he did not have in the Treasury, neither could he satisfy the decree of one claimant with funds which might belong to another; nor could he pay away upon the decree money which had been appropriated by Congress to the payment of the nation's debts. I am aware that the fund has been "covered into the Treasury" by the act of Congress, but that is only a form of law to prevent its illegal surrender or misapplication; the great fundamental distinction between it and the "appropriations" of Congress remains—that it was not raised by taxation nor acquired from the public property of the nation, and that, *as against loyal owners*, the United States have never confiscated it, nor owned it, nor claimed to own it, save as trustee for those to whom it might equitably belong.

But *as against parties guilty of disloyal acts*, the defendants acquired a legal title by lawful capture. There the equitable title to the proceeds follows the legal title in the property; there the Government is both trustee and owner, and possesses a joint or several interest, as the case may be, in the general fund.

Basing my construction of the statute on these general principles, I think this court has erred in several matters:

I. First, the time within which a suit may be brought is prescribed by the statute to be "*within two years after the suppression of the rebellion;* and *within* two years, as was

pithily said by Judge Loring in *Tibbitt's Case*, (1 C. Cls. R., p. 169,) "cannot be *before* or *after* them." And such must have been the intent of Congress, apart from the plain import of their words; for this court could not exercise its jurisdiction within the enemy's lines, nor could the Government find witnesses for the defence, nor could a contestant claimant appear and be heard. Neither did Congress limit the condition of loyalty to a part of the rebellion. It was not sufficient for a claimant to say that he had not given aid or comfort for the part of the rebellion past when his suit began; he must show, "*after the suppression of the rebellion*," that "*he has never given any aid and comfort*" to it. The point, therefore, to be determined is not when the time ended, as is said by the majority of the court, but when the time began. To say that a claimant might maintain his action at any time after the act was approved, is to say that before the rebellion was half over a claimant and his witnesses might straggle in through the military lines, might obtain a decree and receive his net proceeds, and then might straggle back again to spend the money thus acquired in the service of the late confederate States.

The initial point at which an action under the "*Abandoned or captured property act*" can be brought, must be that point of time in the "suppression of the rebellion" at which the Executive department of the Government recognizes the restoration of civil authority and the active jurisdiction of the Federal courts. The rebellion has never been recognized as existing throughout all the territory of the United States. A broad distinction has always been made by Congress between the inhabitants of the loyal and the inhabitants of the insurrectionary States. The President was authorized to recognize these as they existed, (Act 13th July, 1861, 12 Stat. L., p. 255;) expressly authorized to declare the liabilities begun, and impliedly to declare them ended. As a matter of fact, the rebellion began in different States at different times; as a matter of fact, it ended in different States at different times; as a matter of law, it has been treated by Congress as existing by States and parts of States. Neither in fact nor law did it exist as an entirety, either as regards territory or as regards time. Therefore, I think there is no authority for holding, when the same power which lawfully declared Georgia in a state of insurrection

lawfully declared the rebellion in Georgia suppressed, that it was not suppressed, and that its inhabitants were to remain under the same disabilities as the inhabitants of States still in rebellion. Still less do I think that there is authority for holding that the rebellion maintained in a remote corner of Texas, or in the Indian territories, should bar an action accruing to a citizen in a State which might have returned to her allegiance, and been restored to all her former rights.

The time at which the rebellion in the State of Georgia must be deemed suppressed is fixed by the proclamation June 17, 1865, (13 Stat. L., p. 764,) and this for three reasons:

1. Because the proclamation expressly declares that it has become "necessary and proper to carry out and enforce the obligations of the United States to the people of Georgia in securing them the enjoyment of a republican form of government," and provides for the re-establishment of a civil government.

2. Because the proclamation, by general directions to the different Secretaries, puts "*in force all laws of the United States*," and re-establishes post offices, custom-houses, and all the offices of the civil government of the United States; and not only this, but it expressly re-establishes the courts of the United States, by directions to the district judge "*to hold courts within said State*," and to the Attorney General to "enforce the administration of justice within said State *in all matters within the cognizance and jurisdiction of the Federal courts.*"

3. Because this proclamation is the first act of the executive or legislative departments which declares the rebellion suppressed, and when that suppression is once declared, and the time thereby fixed wherein a claimant can bring his action, it cannot be undone by subsequent Executive proclamations or legislative recognitions. A court, in these circumstances, has not a number of proclamations to choose from, but must recognize and be bound by the first. If this court had been required to pass upon the question the morning after the proclamation of June 17, 1865, or April 2, 1866, (14 Stat. L., p. 811,) or if no subsequent proclamation had ever been made by the President, then no man would ever have doubted that one or the other of these proc-

lamations fixed the suppression of the rebellion in the State of Georgia.

Of the objections urged against this proclamation as fixing the time of the suppression of the rebellion, within the meaning of the "*Abandoned or captured property act*," there are but two which need be considered. The first is what is termed the recognition by Congress in the act 2d March, 1867, (14 Stat. L., p. 422,) and of this several things may be said. In the first place, Congress never meant by that act to declare any general recognition of the time fixed by the proclamation of August 20, 1866, but having before them the subject of continuing the war-pay of the army for a limited time, named that proclamation instead of arbitrarily naming a day. A liberal intent toward the army, and a desire to express the theory of the act in the act, sufficiently explain why the last proclamation was named. In the second place, the rebellion may be deemed suppressed in one sense and not in another. Its completion was not the work of any particular moment. In some senses it is not suppressed yet. Its suppression, so far as the army establishment was concerned, was a very different thing from its suppression so far as any other branch of the Government was concerned. Within the meaning of this statute, it was undoubtedly suppressed when the Federal courts were restored to the active exercise of their jurisdiction. And in the third place, Congress could do what this court cannot do, and that is exercise a legislative discretion, and choose among the various proclamations that one which best suited their legislative purposes.

The second objection suggested is, that it will be difficult to decide whether the limitation will run from the time the rebellion was suppressed in the State where the property was captured, or in the State where the claimant resides. The objection is groundless; for a statute of limitations does not depend upon the residence of the plaintiff, but takes effect, in the case of reality, where the cause of action arises, or in most other actions, on the opportunity which the defendant's residence has given to the plaintiff to sue. Here the act would take effect from the time the disability to sue ceased in the State where the cause of action arose. If the claimant were in another insurrectionary State, he, like a claimant in a foreign country, would have two years

wherein to return and bring his action. I presume that, under the rule now adopted, absence from the United States will not give rise to any serious question as to the effect of the statute. A claimant would indeed have to prove his loyalty through the rebellion, wherever he might have been, but that is a different matter, and does not affect his right to bring the action.

In this construction I am confirmed by the action of the bench and bar in these cases. The decision in Tibbett's case. (1 C. Cls. R., p. 169,) that a suit would not be brought until after the suppression of the rebellion, though made by a minority of the court, has never been questioned until the decision in this case, and no more suits were in fact commenced until after the rebellion was supposed to be suppressed. Yet a large number of suits were brought after the proclamation of the 17th June, 1865, and before the proclamation of August 20, 1866; and if the construction now given to the statute by the majority of the court is correct, then the leading case of Margaret Bond was brought before the rebellion was suppressed.

But though we pass the proclamation of 17th June, 1865, there still remains that of 2d April, 1866, (14 Stat. L., p. 811.) It declares "that the insurrection which heretofore existed in the States of Georgia, South Carolina," and eight others, "*is at an end, and is henceforth to be so regarded.*" The question of its construction is not involved in this case, for here the petition was filed on the 22d June, 1867, but it renders certain the fact that the insurrection was wholly suppressed in the State of Georgia before the proclamation of August 20, 1866. The like proclamation had already been made as to the State of Tennessee, (proclamation 13th June, 1865, 13 Stat. L., p. 763,) so that on the 2d April, 1866, but one State had not been thus officially recognized. Whether the doubtful State of Texas could thus defeat the suits of loyal citizens in all the others is the precise question here involved.

II. My second ground of dissent is, that I think the "*Abandoned or captured property act*" should not be so construed as to impair the effect of the previous statute of 17th July, 1862, (12 Stat. L., p. 589, § 6,) which declares "*all sales, transfers, and conveyances*" of persons engaged in the rebellion "*null and void;*" and hence, that when a

claimant acquired the captured property "*after the expiration of the sixty days*" given by that statute, that is to say, "*from the date of the warning and proclamation*" of the President of July 25, 1862, (12 Stat. L., p 1266,) he must be required to prove a loyal title.

It would indeed be hard to require of persons shut in within the insurrectionary district a knowledge of a statute published only on this side of the military lines, were it not that this statute is only the enforcement of a citizen's natural duty. Every man knows that it is his duty to abstain from aiding or trafficking with those engaged in overthrowing the government to which he owes allegiance; and every claimant knew that when he bought cotton from those thus engaged, he at least bought property which had been liable to capture. The statute, therefore, merely compels the court to enforce a duty; and here. as in all other cases, if a party did wrong in ignorance of law, his ignorance does not excuse him. So thought Congress when they enacted the law, and provided that it be made known by the "warning and proclamation" of the President, and so thought the President when he issued that "warning and proclamation," and I know of no sufficient reason why a court should suspend the operation of this act of Congress.

III. Finally, I think the form of the decree is wrong, and by it the court has transcended its powers as regards both claimants and defendants.

In the leading case under this statute, this court has said, (Margaret Bond's Case, 2 C. Cls. R., p. 532:) "We are to decide three things: first, that the claimant was the owner of the property seized and sold; second, that he is entitled to the proceeds; third, that he has never given any aid or comfort to the recent rebellion. If he prove these things, the law says expressly, '*he shall receive the residue of such proceeds*,' after the deduction of the lawful expenses attending its disposition and sale." Now, in practical effect, we depart from this construction of the act by making the claimant prove a fourth thing, viz: the precise balance remaining in the Treasury, or, in other words, the amount of the expenses. There is and can be no propriety in this court finding. for the edification of the Secretary of the Treasury, how much money he has spent, nor how much of the proceeds he has remaining. All that the court can do is

to direct him to pay over the net proceeds; all that the Secretary can do is to pay them. If the decree is too large, he cannot satisfy it, for he has nothing to satisfy it with; if the decree is too small, the claimant is wronged, and a part of the fund remains undisposed of. As a matter of practice, the present course is an empty form, for the Secretary makes up the account and certifies it to the court, and the court adopts it and certifies it back to the Secretary. Furthermore, the practice pursued has done more to confuse the public mind and to mislead parties to their prejudice, than any other point connected with these cases. If the substance of these decrees were truly preserved in their form, it would be clearly seen, that they are not money judgments for the debts of the nation, but simply decrees in equity for the specific return to its owners of property which does not belong to the defendants. The simplest and the wisest practice would be to adopt from chancery a form of decree analagous to that by which a master is directed to withhold the amount of his fees and expenses, and pay to the complainant the balance of a fund now in his hands; *i. e.*, for us to render a decree fixing the number of bales of cotton captured, the place and time of capture, and directing the Secretary to pay over to the claimant the net proceeds thereof.

PECK, J. I concur with Judge Nott, that the initial point at which an action like this might have been brought was within two years after the executive department had recognized the restoration of civil authority and the jurisdiction of the Federal courts.

Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANT,

vs.

HENRY GROSSMAYER.

BRIEF FOR APPELLEE.

Appeal from decision of the Court of Claims.

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Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANT,

vs.

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BRIEF FOR APPELLEE.

Appeal from the decision of the Court of Claims.

The facts of the case are stated in the findings of the Court of Claims, and need not be repeated here.

I.

The counsel for the Government objects to the form of the judgment. The court finds that the cotton in question was seized and sold, and that the net proceeds were paid into the treasury, amounting to $8,040.96, for which amount, judgment is given. This is in conformity to the statute authorizing the judgment.

STATUTE OF LIMITATIONS.

II.

The third section of the act of March 12, 1863, provides that "any person claiming to have been the owner of any such abandoned or captured property may at any time within two years after the suppression of the rebellion prefer his claim to the pro-

ceeds thereof in the Court of Claims." On this limitation the question arises, when was the rebellion suppressed.

Whether insurrection or rebellion was suppressed at a certain date, or still existed, is a political question, and not a judicial fact, and the courts, in determining it, are bound by the action of the political branches of the Government, and that action is final and conclusive.

Marbury *vs.* Madison, 1 Cranch, 166–170.
Gelston *vs.* Hoyt, 3 Wh., 247.
U. S. *vs.* Palmer, Ibid, 610.
Garcia *vs.* Lee, 12 Pet., 511.
Williams *vs.* Suffolk Insurance Co., 13 Pet., 415; S. C., 3 Sum., 270.
Scott *vs.* Jones, 5 H., 343.
Luther *vs.* Borden, 7 H., 1.
Kennett *vs.* Chambers, 14 H, 38.
Clark *vs.* Braden, 16 H., 635.
Fellows *vs.* Blacksmith, 10 H., 366.
U. S. *vs.* Holiday, 3 Wall., 407.
Taylor *vs.* Martin, 2 Curt., 454.
Jones *vs.* Walker, 2 Pa., 688.
Ex parte Metzger, 5 N. Y. Leg. Observer, 83.
Astrom *vs.* Hammond, 3 McLean, 107.
Rose *vs.* Himely, 4 Cranch, 241.
Foster *vs.* Nelson, 2 Pet., 307.
Cherokees *vs.* the State of Georgia, 5 Pet., 20.
Miss. *vs.* Johnston, 4 Wall., 475.
Georgia *vs.* Stanton, 6 Wall., 50; 2 W. Va. Rep., 416.

III.

This question being for the political branches of the Government to determine, it only remains for the Court to decide as to which department of the Government, Congress or the Executive, belongs the right to declare the rebellion suppressed, and from the action of such department to fix the date of its suppression.

The power of making war and of declaring peace are always associated, unless otherwise declared by the supreme power or constitution of a State. (Wheat. Int. Law, Part 4, Ch., 4, sec. 1.) And "wherever the right resides of beginning a war, there, also, must reside the right of ending it, or making peace." (Blackstone, vol. II, 258.) As these powers are always associated, we must conclude that the Executive, whose right and duty it is, under the Constitution and laws of the Government, to declare insurrection or rebellion to exist, and provide for its suppression, must necessarily be the judge as to when it ceases to exist or has been suppressed, and his duty also to declare its suppression.

IV.

The Constitution and the acts of Congress of February 28, 1793, and March 3, 1807, gave the President power to call out the militia and employ the land and naval forces to suppress insurrection and cause the laws to be enforced.

That he is the sole judge of the exigency contemplated by the act, and paramount and final judge as to whether rebellion or invasion exists, was decided in Martin *vs.* Mott, 12 Wheat., 30, and Luther *vs.* Borden, 7 How., 77. (See opinion of Attorney General Bates, July 5, 1861.)

"Congress cannot declare war against a State. The Constitution confers on the President the whole executive power." (Prize Cases, 2 Black, 668.)

The President's proclamations of April 15 and May 3, 1861, calling for volunteers to suppress the insurrection, were ratified by Congress July 4, 1861. The 5th section of the act of July 13, 1862, (12 Stat., 257,) and supplement approved July 31, 1861, also 2d section of act of June 7, 1862, (12 Stat., 422,) authorized the President to declare any States or State, or part thereof, in insurrection; and in pursuance of these acts the President issued his proclamation declaring certain States in insurrection. A state of insurrection or rebellion was thus declared by the Executive and recognized by Congress, and the courts were bound to notice the fact; and the presumption is that the re-

bellion so declared continues until it is proclaimed to be suppressed by the authority which declared it to exist. (United States *vs.* Probasco, 11 Am. L. R., 419,) and in an analogous case, Neptunus, (1 Robinson, 17,) it was held that blockade by notification is, *prima facie*, presumed to continue till the notification is revoked.

V.

When did the Executive first declare the rebellion fully suppressed? This was first done by proclamation of August 20, 1866. On examination of the various proclamations, of June 13, 1865, (13 Stat., 763,) of December 1, 1865, (13 Stat., 1774,) of April 2, 1866, &c., it will be found that the rebellion was not declared to be suppressed, nor so regarded by the Executive, until his proclamation of August 20, 1866, declared the insurrection to be at an end, and peace, order, and civil authority restored throughout *the whole of the United States.*

The act of July 13, 1861, declared that, after the President had declared insurrection to exist in any State, commercial intercourse should thereupon cease and be unlawful so long as the insurrection continued; and the President in his proclamation of March 31, 1863, declared that all commercial intercourse should cease and be unlawful until such insurrection should be suppressed and *notice thereof should be duly given by proclamation.*

And all the restrictions were not removed and commercial intercourse fully and completely restored until the proclamation of August 20, 1866, which shows that neither the Executive nor Congress regarded the rebellion as suppressed until that date.

VI.

The action of the Executive in regard to declaring the existence and suppression of the rebellion was not only in accordance with the previous authority of Congress, but was subsequently ratified. But not only this; Congress has, by legislative enactment on the very point in question, fixed the date of the

suppression of the rebellion on the 20th August, 1866, and expressly adopted the proclamation of that date as determining the question. See act June 20, 1864, sec. 1, (13 Stat., 144;) 2 sec. (14 Stat., 422,) act March 2, 1867, and act March 2, 1867, (14 Stat., 432.)

VII.

Any other mode of fixing the date of this event, except by the action of Congress or the Executive, as by the surrender of all the armed forces of the rebel States, or the opening of the courts in those States, would leave the matter in doubt and uncertainty as to the exact date of the event. The acceptance of a surrender of the rebel armies could not of itself constitute a suppression of the rebellion. There is no authority which can annul the constitutional acts of Congress and the acts of the Executive in pursuance thereof.

It was the intent of the act that this limitation should commence at some definite and certain period to be fixed by Congress or the Executive, that claimant might not be in uncertainty as to whether he was within the limitation in bringing his action. It is the peculiar province and duty of the Executive to give notification of such facts by proclamation, to avoid uncertainty in fixing the date of events in such cases.

Tucker's Blackstone, Part 1, Append., 346.

VIII.

The act of July 17, 1862, is a penal act, and must be strictly construed. The provision of the sixth section as to sales and transfers, &c., being void, should be construed in reference to the object and purpose of the act—not independently, but in connection with the other sections (the 5th, 7th, and 8th) relating to the confiscation of such property. These sections define the object of the act, the class of persons whose property should be liable to seizure, and prescribe the mode of proceedings for the condemnation and sale of such property, and declare that sales and transfers of such property belonging to the class of persons

therein described should be void, evidently intending that this provision should apply only to property seized and condemned as the property of such disloyal persons in the manner therein prescribed, and to no other; for no property in any other way could be applied for the purpose contemplated, under the provisions of this act.

IX.

By the act of July 2, 1864, (13 Stat., 376,) the act of March 12, 1863, was extended and amended, so as to include every description of property mentioned in the act of July 17, 1862. Thus all property liable under the last act to seizure and confiscation was taken out of the operation of the act of July 17, 1862, and brought within the provision of the act of March 12, 1863; and thus the provisions of the act of July 17, 1862, and among them that of the sixth section, as to sales and transfers, were virtually repealed by the act of July 2, 1864, which is in conflict with the previous act of 1862. This act (July 2, 1864,) brought the property within the provisions of the act of March 12, 1863, by which last act the Government expressly waived its title to the property in favor of the loyal owner, on his showing a title good against all others except the Government.

X.

The act of July 17, 1862, was merely a temporary act, and if not virtually repealed by the act of July 2, 1864, expired with the rebellion, and none of its provisions can now be brought forward and applied to divest the title of the legal owner of property, and defeat rights given him by the subsequent act of March 12, 1863, by which the provisions of this act were expressly waived in favor of the loyal owner, who should prosecute his claim under that act.

XI.

The effect and operation of the President's pardon and amnesty was to remove all legal disabilities and penalties from the

parties coming within the class of persons described in the act of July 17, 1862, and it is too late now to declare sales made by them void under the sixth section of this act. For the liability to seizure, condemnation, and sale of the property of the persons described in the act, and their disability to transfer such property by reason of the sixth section of this act, were all intended as a penalty for their offence, for which they have received amnesty and pardon; and the effect of this amnesty or pardon is to remove all legal disabilities and penalties attached to the offence, and to forbid the court to allow it be alleged or proven.

Vattel, Law Nat., 64, ch., 2, § 20.
Cope *vs.* the Commonwealth, 4 Casey Pa. R., 279.
24 Pick, 280.

In *ex parte* Garland, (4 Wall., 418,) this Court held that this power of the President was not subject to legislative control, and that there is only this limitation to the operation of pardon or amnesty, that it does not restore offices forfeited or property or interests vested in others in consequence of the conviction or judgment. (See also 4 Black., 402; 6 Bac. Pardon book 2, c. 37, sec. 34 and 54.)

See also Armstrong Foundry cases, (6 Wall., 766,) and St. Louis Foundry cases, (6 Wall.,) in which it was held that in a proceeding *in rem* in a district court, under the seventh section of the act of July 17, 1862, a pardon pleaded would be a complete and perfect answer to the libel.

XII.

If it were material to inquire into the loyalty of vendors through whom claimant derived title, still the burden of proof must rest on the Government to show that the parties whose sales it seeks to void belonged to the class described in the act, *i. e.*, that they did not cease to aid and abet the rebellion after sixty days from the warning given by the President. By the seventh section of the act of July 17, 1862, the burden of such proof was thrown on the Government. The property could not be condemned

until it was found that the owner was disloyal after the date of the warning referred to. The act of March 12, 1863, only required the claimant to aver and prove his own loyalty. Nor did the third section of the act June 25, 1868, (15 Stat., 76,) have the effect to shift the burden of proof on him. That section only declared that whenever it should be material for the claimant, or *party asserting it*, to prove the loyalty of any person, that is when the burden of proof is on him, that then he should prove affirmatively that he did adhere *throughout the rebellion*, &c., but did not shift the burden of proof on him from the defendant.

This section cannot apply to proof of loyalty of claimant's vendors, for if it did it would require him to prove that such vendors never gave "*any aid or comfort* to the late rebellion," and that they consistently adhered throughout the rebellion (the whole period thereof) to the United States Government. As affecting the validity of sales by such vendors, it could not in any view be material to inquire whether they gave "any aid or comfort to the rebellion," but only whether they ceased to aid and abet such rebellion after the date of the President's warning. And when the wording of this section is considered, it will be found that the *prima facie* presumption of disloyalty from residence can apply only to such persons whose loyalty is asserted throughout the whole period of the rebellion.

XIII.

To hold that the third section of the act of June 25, 1868, imposed the burden on claimant to prove the loyalty of all those through whom he derived title would be to impose new conditions of recovery and impair rights vested under the act of March 12, 1863, which gave claimant the right to recover on certain conditions. Such a construction would make it a retrospective statute, and before any court is justified in such a construction, it must be convinced that the words and terms used admit of no other construction.

Dw. on Stat., 536, 540.

Churchill *vs.* Crease, 5 Brougham, 178, and Torrington *vs.* Hargroves, ib., 492.

Rex *vs.* Smith, Douglas, 141.
Attorney General *vs.* Loyd, Atk., 541.
Same *vs.* Andrews, 1 Ves. Sen., 225.
McEwin *vs.* Bulkley, 26 How., 242.
Hawes *vs.* Tayler, 3 Wall., 329.

XIV.

If this act laid additional grounds of forfeiture, or imposed new conditions of recovery, or new rules of evidence, operating as a punishment for past offences, it would be an infraction of the provisions of the Constitution against *ex post facto* laws.

XV.

The requirement of the act of March 12, 1863, that claimant should prove "ownership" at the time of capture, could not require him to prove the loyalty of his vendors. All that this provision of the act required of him, so far as the validity of the sale to him was concerned, was that he should show that all the legal requisites of a sale were complied with; the legal inference, then, is that he is the owner, and if the defence seeks to avoid this inference by asserting the disloyalty of those through whom claimant derived title, the burden of proof is on him to prove it.

Gray *vs.* Gardner, 17 Mass., 188.
Attleborough *vs.* Middleborough, 10 Pick., 378.
Davis *vs.* Janney, 1 Met., 221.
Powers *vs.* Russel, 13 Pick., 69.
And authorites cited in Starkie on Evidence, p. 588, note.

XVI.

To prove that any party was disloyal to the Government involves a criminal intent, and the law implying innocence, the affirmative, or loyalty, is presumed.

1 Greenleaf, sections 34, 35.

XVII.

Another argument, that it could not have been the intent of the act to require claimant to prove the loyalty of all through whom he derived title, is the inconvenience and, in many cases, the impossibility of such proof, as he might have to prove the loyalty of twenty different persons, scattered throughout the entire insurrectionary district, whose names and residence even, it would sometimes be impossible to ascertain. No text imposing obligations is to be construed as imposing impossible things. (Sedgwick on Stat. and Con. Law, p. —.) "*Lex neminem cogit ad vana seu impossibilia.*"

XVIII.

If this Court should find the sale to claimant void by reason of the disloyalty of his vendors, and this on proof in a suit where such vendor could not be heard, and in a suit brought for the purchase money of the cotton against the claimant by his vendor, the judgment in this Court should be held a bar in the State court to his recovery, on the ground that he conveyed no title to claimant; then such vendor might be deprived of his property by proceedings to which he was no party, and if the State court should give judgment for him, then we should have the decision of the State court and this Court, or the Court of Claims, in direct conflict, the one holding that such sale was valid and the other that it was not.

XIX.

UNCONSTITUTIONALITY OF THE ACT OF JULY 17, 1862.

The validity of this act is a question of constitutional and not of international law. It is void under the Constitution, and cannot be sustained as being the exercise of belligerent rights, or under the so-called war power of the Government. It is also contrary to the principles of international law and the modern usages of war, and the weight of modern authority.

XX.

The power to pass such an act is not given by any provision of the Constitution, either expressly or impliedly.

(*a.*) It cannot be claimed, under the provision giving Congress power to prescribe punishment for treason or other causes; for the act contemplates the seizure, condemnation, and sale of such property, in a manner different from that prescribed by the Constitution, *i. e.*, without presentment or indictment by a grand jury, without arrest and conviction of the owner. Confiscations inflicted for the personal delinquency of the owner are punitive, and should be inflicted only upon due conviction of personal guilt. (Amy Warwick, L. Rep., June, 1862, p. 498.)

(*b.*) This act cannot be sustained under the power given Congress to make rules concerning captures on land and water, for this relates only to war with foreign nations, as decided in this Court. (The Brilliant *vs.* the United States, 2 Am. L. R.)

(*c*) Nor on the ground that the proceeds of the confiscation of such property is to be applied to the support of the army under the power given Congress to suppress insurrection; for the Constitution does not recognize military necessity for taking private property for public use. The right to make war on rebels under this provision gives power to perform acts of war only.

XXI.

The passage of such an act by Congress is expressly forbidden by the Constitution.

(*a*) It is forbidden by Amendment, Article V, that no person shall be held to answer for a capital or other crime without presentment or indictment by a grand jury—arrest and conviction of the owner—nor be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use

without just compensation; and by the sixth amendment, that in all criminal prosecutions accused shall enjoy the right to speedy and public trial by an impartial jury of the State, &c., and by the seventh amendment—

(*b*) It is forbidden by Article I, section 9, that Congress shall pass no bill of attainder.

(*c*) And by article 3, section 2, that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

XXII.

The Federal Government is one of delegated powers, and all powers not delegated to it or inhibited to the State are reserved to the States or the people. This principle is part of the Constitutional amendment, Article X. The Government can exercise no powers not granted by the Constitution, either in war or peace. The Constitution was designed to be perpetual, and preserves its vitality during rebellion as well as foreign wars. It provides for and is equal to every emergency. The Government can receive no extra-Constitutional or unconstitutional powers from a state of war of any kind. If it did, an act of insurrection *ipso facto* would overthrow the Constitution as the supreme law and become a success. The Constitution provides for civil as well as foreign war, and prescribes the punishment for treason, and did not contemplate a denial of its guarantees even to traitors, nor the exercise over them of powers which it did not confer.

In Texas *vs.* White, (7 Wallace,) the Court held that during the rebellion the southern States did not cease to be States of the Union nor their citizens citizens of the Union. If so, the Constitution was in force during the rebellion in all its provisions, and the citizens of the rebellious States were entitled to the benefits of its muniments and safeguards.

The war power cannot destroy any limitations on the power of the Government, except in cases expressly provided for, as in

regard to the suspension of the *habeas corpus* act. The power to suppress insurrection being a constitutional grant must be exercised within constitutional provisions; so long as the insurrectionary organization is treated as rebellious, and not recognized as an independent government, none of the international doctrines with reference to such a country can apply. Rutherforth, in his Institutes, says, that if the struggle between the people and the sovereign should end in civil war, and victory should declare on his side, yet conquest will not of right increase his power, though the whole blame of the war should rest on the people. That the use of force does not produce a right where there was was none before.

XXIII.

The principle announced in Rose *vs.* Himely, 4 Cranch, 241, and the following cases repeating it—6 Cranch, 281; 7 Wheat, 283; 3 Wh., 246, 610; 4 Wh., 52, 497; 14 How., 384; 6 Wh., 191; 9 How., 603, that belligerent rights are superadded to those of municipal sovereignty cannot be understood as declaring that full belligerent rights over the rebellious citizens are superadded to the municipal rights of the Government by civil war, and that it can treat those in rebellion both as alien enemies and rebellious citizens, and that the rights given by the law of nations supersede those given by the Constitution. These decisions rightly understood only decide that the Government may at the same time exercise both international or municipal and extra-territorial powers; the one as to its own citizens, and the other as to neutrals or foreign nations, and the doctrine of these cases does not justify or excuse unconstitutional action in the internal administration of affairs during civil war.

XXIV.

No sovereign can acquire the rights of a conqueror over his own lawful dominions, and especially is this true in constitutional governments. Judge Sprague, in the Amy and her cargo, before referred to, says, "that a State and its inhabitants may be

treated as a foreign territory acquired by arms, is a grave and dangerous error; no nation ever makes such a conquest of its own territory, nor acquires new sovereignty, but merely maintains its previous rights."

XXV.

This act cannot be sustained even if it is held that the principles of international law are applicable. In the case of Brown *vs.* the United States, (8 Cranch,) which seemed to decide that public war gives the sovereign the right to confiscate the property of the enemy wherever found, the court declared the modern usages of war were against the exercise of this rigid rule, and the subsequent decisions of this Court cannot be reconciled with this extreme doctrine. Wheaton, (International Law, p. 344, et seq.,) denies this right of confiscation, also the following authorities:

Bell *vs.* Chipman, 10 John, 183.
Hutchinson *vs.* Brook, 11 Mass., 119.
Lawrence's Wheat. Int. Law, 596, § 5.
Kent also says the weight of modern authorities is against such a right. Vol. I, p. 91. See Martin's, p. 288, et seq.
Vattel, 364.
Polsen, 38, et seq.
Wildman, 9.
Wheaton's Elements, 344, 395.
Treaties between United States and Great Britain of 1783 and 1814.

See also opinion of Chief Justice Marshall, United States *vs.* Percheman, 7 Pet., 86; Phillemore Int. Law, vol. iii, p. 743.

The following authorities also bear on the subject:

1 Pet., 542; 3 Pet., 122; 4 Pet., 511; 7 Wheat., 104; 9 How., 4; 16 How., 164; 10 Pet., 720; 9 Pet., 137, 147, 733.

XXVI.

This act makes no provision for loyal persons in insurrection-

ary districts from which the protection of the Government was withdrawn, who rendered temporary obedience to the rebel authorities, in accordance with the doctrine of *de facto* governments, that where an usurper is in possession the subject is excused and justified in obeying and giving him assistance.

Stephens' Blackstone iv, 221.
Gallison's Rep., vol. vii, 500.
United States *vs.* Haywood, Story J., Lawrence's Wheaton, 2 Annot. ed., 525.
Foster's Com. Law, 399.
3 Inst., 7; 9 How., 603; 9 Cranch, 191.

XXVII.

NON-INTERCOURSE ACTS.

The cotton, the proceeds of which are in question, was purchased during the rebellion, from January to April 1st, 1863, by an agent of the claimants, residing within the confederacy, and therefore was not a violation of the non-intercourse act.

A citizen of a country at war with another may have an agent in the enemy's country, and may enforce the contracts or accept the beneficial acts of his agent after peace; and, in this respect, he may do by an agent what he could not do himself.

Com. *vs.* Penn., 1 Pet., C. C. R., 496.
Deniston *vs.* Imbrie, 3 Wash., C. C. R., 396.
Paul *vs.* Christie, 4 Har. & McH., 161.
Buchanan *vs.* Curry, 19 Johns. R., 137.
Ward *vs.* Smith, 7 Wal. R., 452.

(*a.*) "He," says Emerigon, "who on the public faith has come among us to trade, or for other lawful cause, is not to be treated as an enemy simply because war breaks out between his nation and our own. The credits that a foreigner has amongst us, at the time of the declaration of war, remain entire. If forced himself to withdraw, he is allowed to leave his procuration with a friend to de-

mand what is due to him." (Emerigon's Treatise on Insurance, by Meredith, ch. xii, sec. 35, p. 438.)

(*b.*) In Buchanan *vs.* Curry, (19 Johns. R., 137,) it was held that a contract for the delivery of lumber, made before the war of 1812, with one who, by the war, became an alien enemy, might be lawfully executed during the war by delivering the lumber to his agent within our territory.

The court declared in this case that it was not unlawful voluntarily to pay debts or perform contracts to alien enemies, if the payment be made or the duty be performed in our own country. That the rule forbids during war that money or other resources shall be transferred, so as to aid or strengthen our enemies. That the crime consists in exporting the money or property, or placing it in the power of the enemy, not in delivering it to an alien enemy, or his agent, residing under the control of our Government, (p. 141.)

(*c.*) The right of an alien enemy to have an agent in our country during war, to act for him, receive his credits, &c., is fully established in the case of Ward *vs.* Smith, 7 Wal., 452.

(*d.*) In the case of Potts *vs.* Bell, (8 Term R., 548,) it is admitted that an agent domiciled in the enemy's country might purchase property and hold it for his principal, but that he could not lawfully attempt to send or ship it out to the principal.

XXVIII.

Sending a request to an agent in the confederacy during the war to protect his interests or change his securities was not a violation of the non-intercourse acts of Congress. Even in a war between two nations, acts may be done during the war in recognition of a pre-existing obligation, for the benefit of an alien enemy when the war is ended.

XXIX.

Such a message may fairly be considered within the partial intercourse permitted by the President's proclamation, February 28, 1862, and the commercial regulations of August 28, 1862.

But if the message were illegal, and no authority was given to the agent, yet the agent had a right, voluntarily on his own motion, to purchase and appropriate this property to his creditor, and by the appropriation of it, and the shipment of it to Savannah for storage for him, the title passed, subject only to the ratification of Grossmayer.

Ogle *vs.* Atk., 5 Taunt., 759.
Mitchel *vs.* Edes, A & Ellis, 388.
Fowler *vs.* Devons, 1 Bos. and P., 47.
Mason *vs.* Lickbarrow, 1 H. Bl., 365.
Coit *vs.* Houston, 3 John Cases, 243, and remarks upon it in 19 Wend., 517.
Wilkes *vs.* Ferris, 5 John, 325.
DeWolf *vs.* Gardiner, 12 Cush., 19.

XXX.

The purchase, &c., of Ernstien was fully and distinctly ratified by Grossmayer; and the ratification reverts back and is equivalent to a previous permission or command. *Omnis ratihabitio retrotrahitur et mandato aequiparatur.*

Co. Lit., 207.
Wingate, 485.
Story's Agency, sec. 244.

The intervening seizure of the Government did not affect his rights. The seizure was not in hostility to his claim, but was made for his benefit under the act of 12th March, 1863. Under that act the Government did not take title by virtue of the seizure, but declared that it held the proceeds of the property taken, in trust for and subject to the claims of loyal citizens, and Grossmayer now claims his right to the proceeds under that act.

(*a.*) It was held in Hagedorn *vs.* Oliverson, (2 M. and S., 485,) that a ratification of the act of an unauthorized agent in effecting an insurance is good, and reverts back, though the ratification is not given by the principal until after he knows that the property insured was lost by a capture upon the high seas; and see Story's Agency, § 248.

(*b.*) Claiming the cotton and instituting a suit for it is in itself a sufficient ratification.

Billon *vs.* Hyde, 1 Atk., 128.
Wilson *vs.* Poulton, 2 Sh., 859.
Smith *vs.* Hodgson, 4 T. R., 211.
Coke Lit., 258 a.
Paley's Agency, 315.
Story's Agency, §§ 252–259.

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